

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILLER & LUX INCORPORATED, a Corporation,
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as Ad-
ministrator of the Estate of PIETRO SPINA,
Sometimes Known as PETER SPINO, De-
ceased,

Defendant in Error.

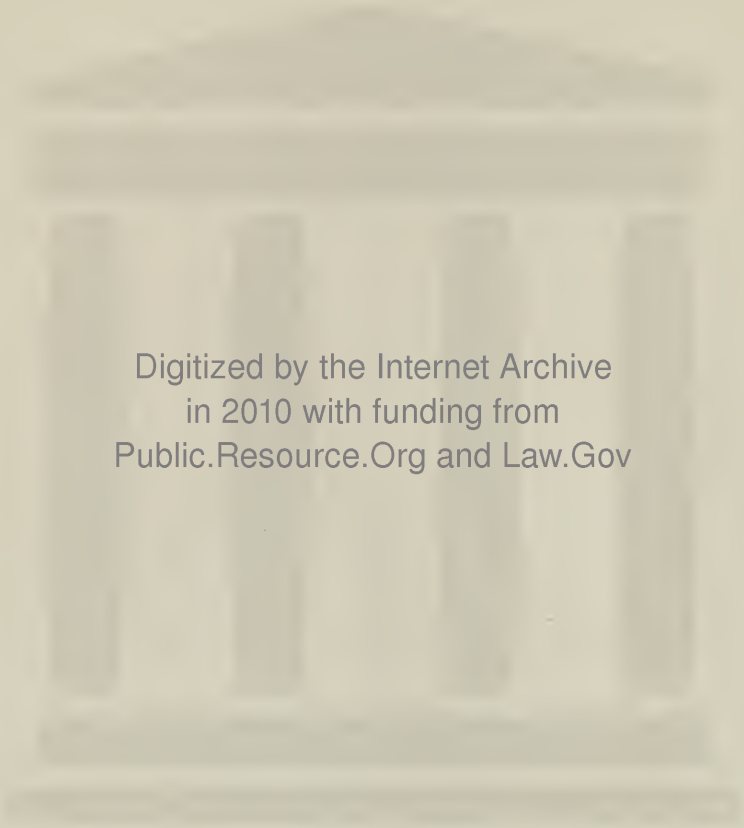
Transcript of Record.

Upon Writ of Error to the United States District Court of the
Southern District of California, Northern Division.

Filed

JAN 13 1916

F. D. Monckton,
Clerk.



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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

EDWARD F. TREADWELL, Esq., 1323 Merchants Exchange Building, San Francisco, California.

For Defendant in Error:

J. J. DUNNE, Esq., Mills Building, San Francisco, California; and MERCER H. FARRAR, Esq., 505 California Street, San Francisco, California. [4*]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Ninth Judicial Circuit in and for

*Page number appearing at foot of page of original certified Record.

the Southern District of California, Northern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said District Court before you, between Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, plaintiff, and Miller & Lux, Incorporated, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, Miller & Lux, Incorporated, a corporation and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit [5] Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 4th day of October next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid may be inspected and the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 7th day of September, in the year of our Lord, one thousand

nine hundred and fifteen, and of the independence of the United States the one hundred and fortieth.

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

By S. Leslie Colyer,

Deputy Clerk.

The above writ of error is hereby allowed.

OSCAR A. TRIPPET,

District Judge.

I hereby certify that a copy of the within writ of error was on the 7th day of September, 1915, lodged in the clerk's office of said United States District Court for the Southern District of California, Northern Division, for the said defendant in error.

WM. M. VAN DYKE,

Clerk United States District Court, Southern District of California.

By Leslie S. Colyer,

Deputy Clerk. [6]

[Endorsed]: No. 42—Civ. In the United States District Court in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, etc., Plaintiff, vs. Miller & Lux, Incorporated, Defendant. Writ of Error. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [7]

*In the United States District Court in and for
the Southern District of California, Northern
Division.*

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Ad-
ministratoꝛ of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corpora-
tion),

Defendant.

Citation.

The United States of America,—ss.

To Saverio di Giovanni Petrocelli, as Administra-
toꝛ of the Estate of Pietro Spina, Sometimes
Known as Peter Spino, Deceased, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held in the city
of San Francisco, in the State of California, on the
4th day of October, 1915, pursuant to a writ of er-
ror on file in the clerk's office of the District Court
of the United States of the Ninth Judicial Circuit,
in and for the Southern District of California,
Northern Division, in that certain action No. 42—
Civil, wherein Miller & Lux, Incorporated, is plain-
tiff in error and you, said Saverio di Giovanni Petro-
celli, as administrator of the estate of Pietro Spina,

sometimes known as Peter Spino, deceased, are defendant in error, to show cause, if any there be, why the judgment given, made and entered against the said Miller & Lux, Incorporated, a corporation, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf. [8]

WITNESS the HON. OSCAR A. TRIPPET, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, this 7th day of September, A. D. 1915, and of the independence of the United States the one hundred and fortieth.

OSCAR A. TRIPPET,
United States District Judge for the Southern District of California.

Service of the foregoing citation is hereby acknowledged this 7th day of September, 1915, saving and reserving all objections and exceptions to the regularity and sufficiency of the proceedings herein, and of each of them.

M. H. FARRAR,
J. J. DUNNE,

Attorneys for Defendant in Error. [9]

[Endorsed]: 42—Civ. U. S. Dist. Court, So. Dist. Cal., No. Div. S. di G. Petrocelli, as Admr. etc., vs. Miller & Lux, Inc. Citation. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [10]

In the District Court of the United States of America in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO), Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

[11]

In the Superior Court of the State of California, in and for the County of Merced.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action against defendant, alleges:

I.

That said defendant is, and at all times herein mentioned was, a corporation, organized and existing under and by virtue of the laws of the State

of California, or some other State in the United States, unknown to plaintiff.

II.

That said plaintiff is, and at all times herein mentioned was, the duly elected, qualified and acting public administrator of the county of Merced, State of California; that on or about the 26th day of July, 1912, the plaintiff was duly appointed administrator of the estate of Peter Spino, deceased, and ever since has been and now is the duly appointed, qualified and acting administrator of the estate of said Peter Spino, deceased.

III.

That Peter Spino died, at and in the county of Merced, State of California, on or about the 1st day of July, A. D. [12] 1912; that at and before the time of the death of said Peter Spino, and at all times herein mentioned, the said Peter Spino was employed by said defendant in the business or occupation of driving a certain harvester team, composed of and consisting of 32 mules, or thereabouts, at what is known as the Midway Camp, or ranch, of the said defendant corporation, in the county of Merced, State of California.

That on or about said 1st day of July, 1912, the defendant carelessly and negligently caused and permitted one Twining, who was then and there in the employ of said defendant corporation, to frighten said harvester team, which said Peter Spino was then driving, and did thereby carelessly and negligently cause said team to become frightened and to run away, which caused said Peter Spino to

be thrown and precipitated from the seat on which he was riding to the ground and to be run over by the harvester, which was then and there being propelled by said team of mules, which said Peter Spino was then and there driving.

That by reason of so falling and being run over by said harvester the said Peter Spino sustained great and violent injury from which he thereafter, to wit, on said 1st day of July, 1912, died.

IV.

That the heirs at law of said Peter Spino, deceased, are a wife, to wit, Jovetta Spino, aged about 35 years, and a minor child, to wit, Sunda Spino, aged about six years residing with said widow in said Kingdom of Italy, and being residents of the Kingdom of Italy.

That during his lifetime said Peter Spino was constantly employed as a laborer and earned large sums of money as wages, [13] and constantly contributed a large part of his said earnings towards the support and maintenance of said wife and child, and that by reason of his said death as aforesaid the said wife and child have been deprived of such further maintenance and support to their great injury and damage.

V.

That plaintiff prosecutes this action for and on behalf of the said wife and minor child of said Peter Spino, as the personal representative of said deceased.

That by reason of the premises and in the particulars above set forth plaintiff has suffered and

sustained damage in the sum of \$25,000.

WHEREFORE, plaintiff prays the judgment of this court against defendant for the sum of \$25,000, and for costs of suit herein.

J. J. GRIFFIN and
BRICKLEY & SCHINO,
Attorneys for Plaintiff.

State of California,
County of Merced,—ss.

G. E. Nordgren, being duly sworn, deposes and says: That he is the plaintiff in the foregoing action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters he believes it to be true.

G. E. NORDGREN.

Subscribed and sworn to before me this 26th day of July, A. D. 1912.

[Notarial Seal] HENRY BRICKLEY,
Notary Public in and for the County of Merced,
State of California.

[Endorsed]: Filed July 26th, 1912. P. J. Thornton, Clerk. [14]

*In the Superior Court of the State of California in
and for the County of Merced.*

No. —.

G. E. NORDGREN, as Administrator of the Estate
of PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX (a Corporation),

Defendant.

Demurrer.

Comes now Miller & Lux Incorporated (a Corporation), defendant in the above-entitled action, and demurs to plaintiff's complaint on file herein on the following grounds:

I.

Said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in the following particulars and for the following reasons, to wit:

1. That it does not appear therein and cannot be ascertained therefrom how plaintiff was injured by the carelessness or negligence of defendant.

2. That it does not appear therein and cannot be ascertained therefrom how or in what manner defendant caused and permitted one Twining to frighten the harvester team in said complaint referred to. [15]

3. That it does not appear therein and cannot be

ascertained therefrom how or in what manner said Twining caused said team to become frightened and to run away.

4. In that it does not appear therein and cannot be ascertained therefrom what was the nature of the great and violent injury sustained by Peter Spino referred to in said complaint.

5. In that it does not appear therein and cannot be ascertained therefrom what was the nature of the work at which said Spino was constantly employed as a laborer, or how he earned large sums of money as wages, or what is meant by "large sums of money," or what part of his earnings he contributed to the support of his wife and child.

II.

That said complaint is ambiguous for all the reasons hereinabove stated for which it is uncertain.

III.

That said complaint is unintelligible for all the reasons hereinabove stated for which it is uncertain.

WHEREFORE defendant prays that it be hence dismissed with its costs of suit.

EDWARD F. TREADWELL,

Attorney for Defendant. [16]

State of California,

City and County of San Francisco,—ss.

J. Leroy Nickel, being first duly sworn, deposes and says: That he is an officer, to wit, the vice-president, of the demurrant above named and makes this affidavit in its behalf; that the foregoing demurrer is not interposed for delay.

J. LEROY NICKEL.

Subscribed and sworn to before me this 20th day of August, 1912.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of
San Francisco, State of California.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD F. TREADWELL,
Attorney for Defendant.

[Endorsed]: Filed Aug. 30, 1912. P. J. Thornton,
Co. Clerk. [17]

State of California,
County of Merced,—ss.

I, P. J. Thornton, county clerk of the county of Merced, State of California, and ex-officio clerk of the Superior Court in and for said county, hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled suit pending in said Superior Court, said record consisting of the complaint, petition for removal, bond on removal, notice of filing petition for removal, demurrer, and order of removal, all on file and of record in my office.

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of said court this 10th day of September, A. D. 1912.

[Seal] P. J. THORNTON,
County Clerk of Merced County and Ex-officio Clerk
of the Superior Court of the State of California,
in and for said Merced County.

[Endorsed]: No. 2653. In the Superior Court of the State of California, in and for the County of

Merced. G. E. Nordgren, as Administrator, etc., Plaintiff, vs Miller & Lux, a Corporation, Defendant. Certified Copy of Record. Edward F. Treadwell, Attorney-at-Law. 1323 Merchants Exchange Building, San Francisco, California. [18]

No. 42—Civil. U. S. District Court, Southern District of California, Northern Division. G. E. Nordgren, as Administrator, etc., vs. Miller & Lux, a Corp. Certified Transcript of Record on Removal from Superior Court of Merced County. Filed Sep., 14, 1912. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. [19]

Note by Clerk, U. S. District Court [as to Copy of Transcript on Removal].

The complaint and demurrer are the only papers included in the foregoing copy of the certified transcript on removal to this court, being only papers enumerated in the praecipe for transcript of record on writ of error filed herein on behalf of the plaintiff in error. [20]

In the United States District Court in and for the Southern District of California, Southern Division.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased.

Plaintiff,

vs.

MILLER & LUX, a Corporation,

Defendant.

Order of Substitution.

The stipulation of G. E. Nordgren, named hereinabove as plaintiff in the above-entitled action, and J. J. Griffin, Henry Brickley, and L. J. Schino, Esqs., at attorneys of record in said action, agreeing to the substitution of Saverio di Giovanni Petrocelli, the present administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, in the place and stead of said G. E. Nordgren as the party plaintiff in the above-entitled action, and agreeing also to the substitution of M. H. Farrar, and J. J. Dunne, Esqs., in the place and stead of said J. J. Griffin, Henry Brickley and L. J. Schino, Esqs., as attorneys for the plaintiff in said above-entitled action, having been duly filed in said cause and court, and with the clerk of said court, and having been duly considered by said Court:

NOW, THEREFORE, in accordance with said stipulation, it is hereby ordered that Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter [21] Spino, deceased, be, and he is hereby substituted as the party plaintiff in the above-entitled action in the place and stead of G. E. Nordgren the above-named plaintiff; and that M. H. Farrar and J. J. Dunne, Esqs., be and they are hereby substituted as attorneys of record for the party plaintiff in the above-entitled action, in the place and stead of J. J. Griffin, Henry Brickley and L. J. Schino, Esqs.

Dated, March 3d, 1913.

OLIN WELLBORN,
Judge of Said Court.

[Endorsed]: 42—Civil. United States District Court in and for the Southern District of California, Northern Division. G. E. Nordgren, as Administrator of the Estate of Peter Spino, Deceased, Plaintiff, vs. Miller & Lux, a Corporation, Defendant. Order of Substitution. Filed March 3, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [22]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO), Deceased,

Plaintiff,

vs.

MILLER & LUX, a Corporation,

Defendant.

Stipulation [that Demurrer may be Sustained, etc.].

In the above-entitled action it is hereby stipulated and agreed, that the demurrer heretofore interposed by the above-named defendant to the complaint in said action may be sustained; and that Saverio di Giovanni Petrocelli, administrator of the Estate of Pietro Spina, sometimes known as Peter Spino,

deceased, heretofore substituted as the party plaintiff in the above-entitled action in the place and stead of "G. E. Nordgren," as administrator of "the estate of Peter Spino, deceased," and now plaintiff in said action, may have twenty (20) days from and after notice of the entry of the order of said court sustaining said demurrer pursuant to this stipulation within which to prepare, serve and file an amended complaint in the above-entitled action.

[23]

Dated April 30th, 1913.

EDWARD F. TREADWELL,
Attorney for said Defendant.

J. J. DUNNE,

MERCER H. FARRAR,

Attorneys for Saverio di Giovanni Petrocelli, Administrator of the Estate of Pietro Spina, Sometimes known as Peter Spino, Deceased, Plaintiff in Above-entitled Action.

Order [Sustaining Demurrer, etc.].

Upon reading and filing the foregoing stipulation, it is hereby ordered that the demurrer of the above-named defendant to the complaint now on file in the above-entitled action, be and the same is, hereby sustained, with leave to Saverio di Giovanni Petrocelli, administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, the present plaintiff in said action, to prepare, serve and file an amended complaint in said action, within twenty (20) days from and after service of notice of the entry of this order.

Dated May 5th, A. D., 1913.

OLIN WELLBORN,
Judge of said Court.

No. 42—Civil. United States District Court in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spino (Sometimes Known as Peter Spino), Deceased, Plaintiff, vs. Miller & Lux, a Corporation. Defendant. Stipulation and Order. Filed May 5, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.
[24]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED, a Corporation,

Defendant.

Amended Complaint.

Now come the above-named plaintiff, and by leave of Court first had and obtained makes and files this amended complaint in the above-entitled action, and for cause of action herein against the above-named

defendant, alleges and shows as follows:

I.

During all the times herein mentioned, the above-named defendant was, and still is, a corporation, organized according to plaintiff's best knowledge, information and belief, under and pursuant to the laws of the State of Nevada, and acting and doing business in said State of Nevada and in the State of California, and having and maintaining offices and places of business in said States of Nevada and California.

II.

That on or about the first day of July, A. D. 1912, upon [25] premises owned, occupied, controlled and operated by said defendant in the county of Merced, in the State of California, the above-named Pietro Spina, sometimes known as Peter Spino, died; and that thereafter, by due and proper proceedings had in the matter of the estate of said Pietro Spina, sometimes known as Peter Spino, deceased, in and before the Superior Court of the State of California, in and for the county of Merced, the above-named Saverio di Giovanni Petrocelli was, by an order of said Superior Court duly given, made and entered on February 17th, 1913, in the matter of said estate, duly appointed administrator of the said estate of said deceased: that thereupon, on said 17th day of February, 1913, said Saverio di Giovanni Petrocelli duly qualified as such administrator in manner and form as required by law, and letters of administration of and in said estate were duly issued to him; and that, ever since

said 17th day of February, 1913, said Saverio di Giovanni Petrocelli has been, and he still is, the duly appointed, qualified and acting administrator of the estate of the aforesaid Pietro Spina, sometimes known as Peter Spino, deceased.

III.

This plaintiff further shows that, at said time of his said death, said Pietro Spina, sometimes known as Peter Spino, deceased, and hereinafter referred to as the decedent, was of the age of about 35 years; was a married man, and left him surviving as his sole heirs at law his wife, named Giuditta di Giovanni Petrocelli Spina, aged about 35 years, and his daughter, named Assunta Spina, aged about 6 years, both of whom were, and still are, residents of the Kingdom of Italy; that for a long time prior to and at his said death, said decedent had been a farm laborer by occupation, and had no other source of income except [26] the wages earned by him in his said occupation; that during all of said times, prior to and at his said death, the aforesaid wife and daughter of said decedent were, and each of them was, dependent upon said decedent and his said earnings for their, and each of their, maintenance and support; that during all of said times prior to and at his said death, said decedent was without independent means or fortune, and was dependent for his support and maintenance and the support and maintenance of his said wife and daughter, upon his said wages earned in his said occupation of laborer; and in this behalf, this plaintiff shows that the average wages and earnings of

said decedent as such laborer aforesaid, for a long time prior to and at said first day of July, 1912, were the sum and amount of one hundred dollars, in lawful money of the United States, for each and every calendar month; and in this behalf, this plaintiff further shows that, for a long time prior to his said death, said decedent contributed to the support and maintenance of his said wife and child the sum and amount of about fifty dollars for each and every calendar month, out of and from his aforesaid wages and earnings, and that, by reason of his said death as aforesaid, his said wife and daughter have been, and are still, deprived of said support and maintenance, to their, and each of their, great injury and damage.

IV.

This plaintiff further shows that on the first day of July, 1912, at Midway Camp or Ranch, in the county of Merced, in the State of California, by, through and in direct and immediate consequence of the carelessness and negligence of said defendant, said decedent came to his death; and in this behalf, this plaintiff avers and sets forth the fact constituting said carelessness and negligence of said defendant as follows: [27]

Prior to and on said first day of July, 1912, said defendant, owned, occupied, controlled and operated said Midway Camp or Ranch, and was engaged in harvesting a crop thereon; during said time, and on said first day of July, 1912, said decedent was employed by said defendant to drive, and was then and there actually engaged in driving for said de-

fendant, a certain harvester team composed of about 32 mules, and then and there used in the aforesaid harvesting of the aforesaid crop; during said times, and on said first day of July, 1912, one Twining was employed by said defendant to follow and attend said harvester and count and record the sacks as they came from said harvester, and on said first day of July, 1912, said Twining was actually engaged in his said employment, and, for the purpose of enabling said Twining to perform the duties of his said employment, said defendant furnished him with a horse for use in that regard; said horse, so furnished as aforesaid by said defendant to said Twining, was then and there, to the knowledge of said defendant, a restive, fractious, vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach said harvester team because of its frightening said mules; that on said first day of July, 1912, said defendant carelessly and negligently caused and permitted said Twining, for the purpose of counting and recording said sacks, to approach, and said Twining did approach, said harvester team with said dangerous and frightening horse aforesaid then and there entrusted to him by said defendant as aforesaid, without any effort to manage, restrain, control or quiet said horse, and failed and neglected to take any precautions in the car and driving of said horse to avoid the frightening of said harvester [28] team; that by reason of said carelessness and negligence of said defendant, said dangerous and frightening horse aforesaid did then and

and there frighten said harvester team which, as above alleged, said decedent was then and there driving, and cause said harvester team to run away, whereby said decedent was violently thrown and precipitated from the seat on which he was riding to the ground, and run over and killed by said harvester, which was then and there being propelled by said frightened team of mules.

V.

That the aforesaid death of said decedent was caused and brought about wholly by reason of the aforesaid carelessness and negligence of defendant; and in particular by the carelessness and negligence of defendant in failing and neglecting to take reasonable and proper precautions to protect said decedent; and in particular, by the carelessness and negligence of defendant in failing and neglecting to supply and provide proper, adequate and safe appliances and instrumentalities for the conduct of its operations; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said decedent with a safe place of work; and in particular, by the carelessness and negligence of defendant in causing and permitting said Twining to use said dangerous and frightening horse; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said Twining with such a safe and gentle horse as would enable him to approach said harvester team without frightening it; and in this behalf, this plaintiff alleges and shows that said acts of said defendant set forth in this complaint con-

stitute and concurred in causing the wrong for which redress is sought herein; and [29] further alleges and shows that the cause of action herein is based upon each and all of said acts.

VI.

That by reason of the aforesaid carelessness and negligence of said defendant resulting in said death of said decedent as aforesaid, and by reason of all the premises herein, the aforesaid wife and minor daughter of said decedent have suffered and sustained damages in the sum and amount of twenty-five thousand (\$25,000) dollars.

VII.

That this plaintiff prosecutes this action for and on behalf of the aforesaid wife and minor daughter of said decedent.

WHEREFORE, said plaintiff prays judgment against said defendant for the sum of twenty-five thousand (\$25,000) dollars, and for his costs and disbursements herein properly expended.

MERCER H. FARRAR,

J. J. DUNNE,

Attorneys for Plaintiff. [30]

State of California,
County of Merced,—ss.

Saverio di Giovanni Petrocelli, being first duly sworn deposes and says, that he is the plaintiff named in the foregoing amended complaint; that he has heard read, and has had translated to him said amended complaint and knows the contents thereof; that said amended complaint is true of his own knowledge except as to the matters which are

therein stated upon information or belief; and that as to such matters, he believes it to be true.

X SAVERIO di GIOVANNI PETROCELLI.

Subscribed and sworn to before me this 14th day of July, A. D. 1913.

JAMES V. TOSCANO,

Notary Public in and for the County of Merced,
State of California.

State of California,
County of Merced,—ss.

On this 14th day of July, in the year one thousand, nine hundred and thirteen, A. D. before me, James V. Toscano, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Saverio di Giovanni Petrocelli personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JAMES V. TOSCANO,
Notary Public in and for the County of Merced,
State of California. [31]

Receipt of a copy of the foregoing Amended Complaint is hereby admitted, this 16th day of July, 1913.

EDWARD F. TREADWELL,
Attorney for the Defendant, Miller & Lux Incorporated, a Corporation.

[Endorsed]: No. 42—Civil. United States District Court, in and for the Southern District of Cal-

ifornia, Northern Division. Saverio di Giovanni Petrocelli, Plaintiff, vs. Miller & Lux, Incorporated, a Corporation, Defendant. Amended Complaint. Filed Jul. 17, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Plaintiff. San Francisco. [32]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO), Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Answer.

Now comes the defendant above named and answering the complaint of plaintiff admits, alleges and denies as follows:

I.

1. It has no information or belief sufficient to enable it to answer the allegations of paragraph two (II) of said complaint, and placing its denial on that ground it denies that by due or proper proceedings in the matter of the estate of Pietro Spina

(sometimes known as Peter Spino), deceased, in the Superior Court of the State of California, in and for the county of Merced, said plaintiff, by an order of said Superior Court, duly given, made and entered, was appointed administrator of the estate of said decedent, and denies that he qualified as such administrator in the manner and form required by law, or that letters of administration were duly or otherwise issued to him, or that he has been or still is the duly appointed, qualified or acting administrator of the estate of said decedent. [33]

2. It has no information or belief sufficient to enable it to answer the allegations of paragraph three (III) of said complaint, and placing its denial on that ground it denies that at the time of his death the said Spino was of the age of thirty-five years, was a married man, or left him surviving as his sole heirs at law his wife and daughter named in said complaint, or either of them; denies that during all of said times prior to his death the wife or daughter of said decedent were or that each of them was dependent upon said decedent, or his earnings, for their or each of their maintenance or support; denies that the average wages and earnings of said decedent for a long time prior to or at the first day of July, 1912, exceeded the sum of sixty (60) dollars per month; denies that said decedent contributed to the support and maintenance of his wife and child in the sum of fifty (50) dollars for each or every month; denies that by reason of his death his wife or daughter have been or are deprived of his support or maintenance, to their or

each of their injury or damage.

3. It denies that decedent came to his death by, through or in direct or immediate or other consequence of the carelessness and negligence or carelessness or negligence of the defendant; denies that the horse mentioned in said complaint was then or there to the knowledge of said defendant, or otherwise, a restive, fractious, vicious or frisky animal, or not easily controlled or liable to run away, or a dangerous animal with which to approach said harvester team because of its frightening the mules attached to the same, or any other reason, or at all; denies that defendant carelessly or negligently caused or permitted said Twining to approach or that said Twining did approach [34] said harvester team with said or any dangerous or frightening horse then or there entrusted to him by defendant, or otherwise, or without any effort to manage, restrain, control or quiet said horse, and denies that said Twining or defendant failed or neglected to take any precautions in the care or driving of said horse to avoid the frightening of said harvester team; and denies that by reason of said or any carelessness or negligence of said defendant said or any dangerous or frightening horse did then and there, or otherwise, frighten said harvester team, or cause said harvester team to run away, and denies that by reason of any carelessness or negligence of defendant said harvester team did run away or whereby said decedent was violently or otherwise thrown or precipitated from the seat on which he was riding to the ground, or run over or killed by said harvester, but in the contrary the said

defendant alleges that said team ran away and the said decedent was thrown and killed without any carelessness or negligence by the said defendant of any kind or character whatsoever.

4. Said defendant denies that the death of said decedent was caused or brought about wholly or at all by reason of the aforesaid or any carelessness or negligence of defendant, or by the carelessness or negligence of defendant in failing or neglecting to take reasonable or proper precautions to protect said decedent, or by the carelessness or negligence of defendant in failing or neglecting to provide proper, adequate or safe appliances and instrumentalities for the conduct of its operations or by the carelessness or negligence of defendant in failing or neglecting to provide the said decedent with a safe place of work, or by the carelessness or negligence of defendant in causing or permitting said Twining to use said dangerous or frightening [35] horse, or by the carelessness or negligence of defendant in failing and neglecting to provide said Twining with such a safe or gentle horse as would enable him to approach said harvester team without frightening it; and denies that any acts of defendant constitute or concurred in causing any wrong to said decedent, and denies that any cause of action by the said plaintiff is based upon each or all or any of said acts.

5. Denies that by reason of the aforesaid carelessness or negligence of said defendant the wife and minor daughter, or wife or minor daughter of said decedent, have suffered and sustained, or suffered or sustained, damages in the sum of twenty-five thou-

sand dollars (\$25,000), or any other sum.

6. Denies that the plaintiff prosecutes this action for or in behalf of the aforesaid wife or minor daughter of said decedent.

II.

As a further, separate and distinct defense to the said action said defendant alleges:

1. That the said decedent was brought to his death by reason of acts of negligence of the said decedent which contributed to and were the direct cause thereof, and in this behalf the defendant alleges that said decedent took no proper care or precaution to control the said team, or to prevent the same from running in case it should be frightened from any cause; nor did he take any proper care to hold himself on the said seat of said harvester when the said team ran as aforesaid, but on the contrary negligently and carelessly lost control of the said team and negligently and carelessly dropped or fell from the said harvester, and by reason of the said negligence and carelessness [36] of the said decedent received the injuries which caused his death, as aforesaid.

WHEREFORE defendant prays that plaintiff take nothing by his said action, and that it be hence dismissed with its costs.

EDWARD F. TREADWELL,

Attorney for Defendant.

State of California,

City and County of San Francisco,—ss.

David Brown, being first duly sworn, deposes and says: that he is the secretary of the defendant in the above-entitled action and makes this verification

in its behalf; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

DAVID BROWN.

Subscribed and sworn to before me this 26th day of July, 1915.

[Seal]

JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 42—Civil. In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator, etc., Plaintiff, vs. Miller & Lux, Incorporated, Defendants. Answer. Received a copy of the within this 26th day of July, 1913. M. H. Farrar and J. J. Dunne, Attorneys for Plaintiff. Filed Jul. 28, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Edward F. Treadwell, Attorney-at-Law, 1323 Merchants Exchange Building, San Francisco, California. [37]

[**Verdict.**]

*In the District Court of the United States, in and
for the Southern District of California, Northern
Division.*

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INC., a Corporation,

Defendant.

We, the jury in the above-entitled case, find in favor
of the plaintiff and against the defendant, and assess
the damages in the sum of \$5,000.

Fresno, California, May 18, 1915.

J. A. LANE,

Foreman.

[Endorsed]: 42—Civ. U. S. Dist. Court, So. Dist.
Cal. No. Div. S. de G. Petrocelli, as Adm'r, etc.,
vs. Miller & Lux, Inc. Verdict. Filed May 18, 1915.
Wm. M. Van Dyke, Clerk. By Leslie S. Colyer,
Deputy. [38]

*In the District Court of the United States, in and
for the Southern District of California, Northern
Division.*

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INC., a Corporation,

Defendant.

Judgment.

This cause coming on regularly on Monday, the 17th day of May, 1915, being a day in the May term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, to be tried by the Court and a jury to be duly impaneled; Mercer H. Farrar, Esq., and J. J. Dunne, Esq., appearing as counsel for plaintiff; Edward F. Treadwell, Esq., and Frank H. Short, Esq., appearing as counsel for defendant; and a jury of twelve (12) men having been duly impaneled herein; and the trial having been proceeded with on said 17th day of May, and on the following 18th day of May, 1915; and oral and documentary evidence having been introduced on behalf of the respective parties; and said cause having been argued to the jury by respective counsel and submitted to the jury, for their consideration, under the instruc-

tions of the Court; and the jury having, on said 18th day of May, 1915, rendered the following verdict:
[39]

“In the District Court of the United States, in and for the Southern District of California, Northern Division.

SAVERIO di GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, Plaintiff, vs. Miller & Lux, Inc., a Corporation, defendant. No. 42—Civil. We, the jury in the above-entitled case, find in favor of the plaintiff and against the defendant, and assess the damages in the sum of \$5,000. Fresno, California, May 18, 1915. J. A. Lane, Foreman,” and the Court having ordered that judgment in accordance with the verdict of the jury be entered herein;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, plaintiff herein, do have and recover of and from Miller & Lux, Inc., a Corporation, defendant herein, the sum of five thousand dollars (\$5,000), together with his ,said plaintiff’s costs herein, taxed at \$——.

Judgment entered May 18, 1915.

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: No. 42—Civil. United States District Court, Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as administrator, etc., vs. Miller & Lux, Inc. Copy of Judgment. Filed May 29, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [40]

[Endorsed]: No. 42—Civil. In the District Court of the United States for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Adm'r, etc., vs. Miller & Lux, Inc., a Corp. Judgment-roll. Filed May 29th, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

Recorded Judg. Register, Book No. 1, page 110.
[41]

*In the United States District Court, in and for the
Southern District of California, Northern Division.*

No. 42 (CIVIL).

SAVERIO di GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, Incorporated (a Corporation),
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on for trial on the 7th day of May, 1914,

before the Court, Hon. Edward S. Farrington presiding, and a jury, and resulted in a verdict in favor of plaintiff for the sum of five thousand (5,000) dollars; that thereafter, the defendant duly made a motion for a new trial; and said Court thereafter made its order setting aside the verdict and granting a new trial of said action.

Thereafter, and on the 17th day of May, 1915, the said cause came on regularly for trial before the Court, Hon. Oscar A. Trippet presiding, and a jury, Messrs. J. J. Dunne and Mercer H. Farrar appearing for the plaintiff and Messrs. Edward F. Treadwell and Frank H. Short appearing for the defendant, and a jury having been duly impaneled, the following proceedings took place:

By consent of said defendant, plaintiff read in evidence the testimony of G. Albano, a witness on behalf of the plaintiff at the former trial, which was as follows: [42]

[Testimony of G. Albano, at Former Trial, for Plaintiff.]

I am a farm laborer. During the months of June and July, 1912, I was employed at Midway Camp by Miller & Lux. I knew Pietro Spina, or Peter Spino, in his lifetime. I was working on a harvester machine on the 1st of July, 1912, at the Miller & Lux ranch. Bill Trainor was working with me and Salapi, and Mr. Knight. Mr. Knight was the boss of the machine. Pietro Spina was driving the mule team attached to the harvester, consisting of thirty-two mules. I was on the harvester on July 1st, 1912, when Peter Spino was killed. I do not know Twi-

(Testimony of G. Albano.)

ning, but just before Peter Spino was killed I see a boy with a horse and cart. When I first saw the boy with the horse and cart he was pretty close to the machine. I was sack-tender and was on the left side. The horse and cart was also on the left side of the harvester going the same direction as the harvester. At that time it was running pretty fast. The boy in the cart was counting the sacks. At the time when the horse and cart were going pretty fast the boy was holding the horse.

Q. Show us how he was holding the horse, how were his arms, describe his arms?

A. He was holding the horse pretty strong.

Q. Show us what position his arms were in at that time? A. (Witness illustrates.)

Mr. DUNNE.—I would like the reporter's notes to show that the witness extended his arms full length.

The next thing that happened this man died. He fell down on the ground and he died. When the little cart was passing by the mules it scared them and they turned around and the man fell down on the ground from the seat. He was on the driving seat of the harvester. When the mules got scared in that way they started to run away. When they run away they turned around to the right. They went near a ditch or canal where they [43] got tangled up and they stopped. When they stopped I went to the dead body of Pietro Spina. I found it back of the machine a little bit off.

(Testimony of G. Albano.)

Cross-examination.

I seen that boy in the cart when he first came up to the harvester. He came up to get the number of sacks. Mr. Trainor got off the harvester and went out to the cart to give him the number of sacks. Mr. Trainor was not at the cart when the horse that was on the cart began to run away. He was on the ground quite a ways off from the cart. He went up to the cart after he got off of the harvester. The boy was in the cart all the time. I did not notice when the horse and cart first began to run,—not when they started. After the horse started to run the mule team started to run away also. I don't know, I cannot say how far they ran. I don't know if they went a hundred yards. Spino fell down. There was a high check there. The harvester went over a check or levee and that is where Spino went off. The lines were in Pietro Spino's hands. He had them in the seat. There was one around, tangled on his foot. I know what is called the ladder up to the seat. The line was dragging him along. I seen him when he fell down from the seat to the ground and he had the lines tangled up about his foot. I could see the seat from where I was.

[Testimony of Orison Knight, for Plaintiff.]

ORISON KNIGHT, a witness called on behalf of plaintiff, testified as follows:

I am a laborer. I work through the harvest, run the machine and so on. I have been engaged in farming operations for about twenty years or more. During that time have been employed principally by

(Testimony of Orison Knight.)

Miller & Lux, and am in the employ of Miller & Lux now, and was in June and July, 1912, at Los Banos, in Merced County, running the harvester. It was on Midway Camp [44] where I started up. In the course of my experience in farming I have had experience with horses and mules for thirty or thirty-five years, driving them, breaking them, and all kinds of experience. Am acquainted with the habits and manners of such animals. From my experience in that respect a mule team is easily frightened; a mule team frequently runs away. The general characteristics of mule teams are known to persons engaged in farming operations. A harvester, when in operation, makes a regular noise. That regular usual noise of a harvester does not frighten the mule team; a sudden noise will. A sudden noise that they are not accustomed to will frighten them. If a mule team is approached from behind by another animal, that will have a tendency to frighten the mule team. If the animal that approaches the mule team from behind is going at a high rate of speed, going rapidly, that will frighten the mule team. A mule team will be frightened by one who drives up to it in a heedless way. My experience covers not only mules but horses. When horses start to run they don't know when to quit. I have driven them, broken them, and used them in various ways. I recollect the boy named Twining. I met him two or three times. I was not well acquainted with him. I have seen this boy out in the field, where this harvester was working at Midway Camp, a couple of times. I think he was about

(Testimony of Orison Knight.)

eighteen or twenty years of age. I did not pay much attention to him.

Five men were employed on the harvester including myself. I was foreman, Peter Spina was driver, Albano was sack-tender, Salapi was header tender, and Trainor was sack-sewer. The sack-sewer is on the left-hand side, about two feet from the ground. There is a platform at the front end. I recollect the day when Spina was killed. Salapi had been working about a month before that. Spina was the driver; he faced the mules, with his back toward the machine. Spino, the driver, had worked on that harvester for about a month before the day of the death [45] mentioned here. I was in charge of the harvester as foreman. Spina was earning in that capacity three dollars a day and his board, working twenty-six days a month. On the 27th of June, 1912, three days before Spina died, I saw this boy Twining. I saw him coming through the field up to the harvester. This was three days before Spina's death.

“Q. Now, on that day three days before Spina's death, what, if anything, did Twining do on that day with his horse?”

To which question the defendant duly excepted as being entirely irrelevant, incompetent and immaterial, being three days before the accident, and on the further ground that they should first show how this happened and whether there is any possible materiality in what took place before, which objection was overruled, to which ruling defendant duly excepted.

He came out to the machine. He was driving

(Testimony of Orison Knight.)

a brown horse. He got out of the cart and *and* got in where the sack-sewer was and I was on top of the machine, and I looked up and saw his cart going around the team, and mules started to run and I grabbed the brake and stopped them. When he got out of his cart on that occasion he let his horse go. The horse went up alongside the mules and then they started to run when I got to the brake and stopped them.

“Q. Now, when that transaction occurred, did you say anything to Twining? A. I did.

“Q. What did you say to Twining at that time?”

To which question defendant objected on the ground that it is hearsay and not binding on the defendant, and particularly that until it is shown that on the day of this accident Twining was doing the same thing that he did at that time, namely, letting his horse wander around, it is entirely irrelevant and immaterial to any issue in this case. Which objection *we* Court overruled, [46] to which ruling the defendant duly excepted.

When I stopped the team I got up on the machine where he would see me and I said: “You take care of that horse or stay out of the field; that he might cause a runaway, and kill somebody, or some of the mules tear up the machine.” When I said that to Twining I never heard him make any reply. He got in his cart and drove off. Three days later, on the first of July, 1912, I started out about six o'clock from the ranch. Spina was killed about half-past nine. I saw the boy Twining approach the har-

(Testimony of Orison Knight.)

vester that morning. When I first saw him he was probably a quarter of a mile away coming from the south. The harvester was going west. The boy Twining was approaching the harvester from the south on that occasion, between a gallop and a run. As he came up from the south and came on toward the harvester he was twisting around some, and when he got up closer to the harvester he whirled around a couple of times, and then drove up in front of the machine where the sack-sewer was. This was a different horse from the one he was driving on June 27th.

“Q. Now, you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion. State your opinion as to the character of that horse.”

To which question defendant objected, as being incompetent, irrelevant and immaterial, and calling for the conclusion of the witness, and no foundation laid for it. Objection overruled by the Court, to which ruling the defendant duly excepted.

“A. Well, in my opinion it was a high-lifed, small horse. One that needs attention. In my opinion it was a spirited animal. The reasons I have in mind for this opinion are the way the horse ran through the field and run around the machine after he got him up there. He was running through the field, and I seen him running over the checks, and I could tell he was coming pretty fast. [47] He did not pursue a straight line. He was turning coming around, kind of twisting zigzag. The cart

(Testimony of Orison Knight.)

was a medium cart without any brakes. Had two wheels, and no dashboard. There was no one else in the cart except Twining. When I saw him approaching in the way I have described through the field approaching the harvester I went down to the brake on the harvester. The mule team was all right and was going a slow walk. At the time Twining's horse and cart got alongside the harvester, when the harvester was going west, and the horse walking, Twining's horse was walking. When the mule team was walking and Twining's horse was walking the distance between the harvester and the cart was probably twenty feet. When he got alongside the harvester in the position and under the circumstances I have described, I thought everything was all right and I saw a check and I went down to the brake. When I got down to the brake at that time, I could not see Twining or Trainor, my view was obstructed by the cleaner.

I left the farmhouse that morning to go to work at six o'clock, and this accident happened about half-past nine. The harvester got in motion about seven o'clock, and between seven and nine the harvester crossed several checks, and on those occasions there was no runaway. A check is a slight elevation in the ground to hold the water. Probably two feet high, a foot and a half, some higher and some lower, depending on the formation of the ground. They slope up and down, a gentle slope. When the harvester was nearing this check and I was at the brake the mules started to run. At that time when the

(Testimony of Orison Knight.)

mules started to run I saw Twining. He was running right alongside the mules; his horse was going pretty fast. So far as my observation of the facts occurring there on that occasion permits, the harvester did not start Twining's horse to run, nor did the mules themselves so far as my observation went start Twining's horse to run. [48] I did not see any member of the harvester do any act to start Twining's horse or the mules. After I lost sight of Twining and went behind the cleaner the next time I saw him the horse was alongside the mules and going pretty fast, 14 or 16 feet away from the mule team, running west. The mules were running west also and run probably a hundred yards. They then turned to the right, turned right short, and run down through the grain field, probably a couple of hundred yards, and run into a ditch of water and turned to the left. I jumped off and run ahead of them and stopped them. I did not see Spina after the sharp turn to the right. I saw him just before the turn on the seat. After that I next saw Spina lying on the ground dead. The harvester was fitted with a bull wheel. I observed the track of the bull wheel on that occasion. Spina's body was lying right in the track. Twining got his horse turned about the time the mules turned. He went back the same way he came, south. He turned to the left. About the same time the mule team turned to the right. After turning to the left he went about a quarter of a mile. I saw him stop; he was stopped, looking back. That is the last I saw him. I saw him after that going

(Testimony of Orison Knight.)

through the field. He did not return to the scene. The nearest farmhouse to the scene of the occurrence is about two miles.

Cross-examination.

I was foreman of the crew. It was my duty to take charge all over the machine, watch everything, sometimes one thing and sometimes another. I was watching the brake. There was more than one brake on the machine. It was the duty of the sack-sewer to watch one brake and the driver to watch the other. [49] One of the brakes was my particular duty. Twining was going around for the purpose of getting the count of sacks that were being cut and harvested. Before the day of this accident, he had been there on at least one occasion, and got the count of the sacks. As to whether Twining had been there more than once before, I only remember of his having been out there twice; I remember his being there once before the runaway. The time he came there the first time he did not have the same horse that he did when he came the second time. The first time he came he drove up alongside the harvester, probably 8 or 10 steps away. He came from the rear of the machine. When he first came up and I seen him riding *along* the machine, he was in the cart. I did not see him get out of the cart on that occasion. I could not see him. I went down to the brake and saw his horse and cart going up around the leaders and I ran to the brake, when the team started up. The next thing I saw on that occasion was the horse and cart going along without anybody in it, up close

(Testimony of Orison Knight.)

to the mule team, and the mule team started. The horse was wandering around near the mules, and he was not in the cart at that time. I suppose he was in the doghouse, where the sack-sewer was; that would be where he would go to get the count of the sacks. That was when I told him that he must either take care of his horse or stay out of the field. He was not taking care of his horse at that time. His horse was walking along without anybody in the cart at all. It is not unusual at all for a buggy or a cart to drive up along the harvester while it is in operation from behind; they keep out of sight of the mules. The noise that would be ordinarily made by driving a horse and cart in an ordinary way up to the side of or from the rear of [50] the harvester, over the ground, would be pretty nearly, if not entirely, killed by the noise of the machine itself. It is not an extraordinary or unusual thing at all to drive a cart up alongside of the machine for the purpose of getting the count of sacks or for any other purpose. That is done, the foreman will come up or a boy getting sacks, as a general thing, wherever harvesting is being done.

On the second occasion I saw Mr. Twining after he arrived at the harvester in the cart. He was probably twenty feet off from the harvester. He came in right to the back of the machine and made a couple of circles, and pulled up alongside. He came in, not to the back of the machine; he came from the south to the back of the machine. The machine was going west. He came in on a sort of angle, made a couple

(Testimony of Orison Knight.)

of circles, close to the back of the machine and went in alongside. The harvester was moving at that time. The mules were going at a slow walk. When he came alongside there at the place where I saw him his horse was walking; his horse was walking the last I saw of him. I first went to the brake when he was making those circles around the machine when he came up. I was at the brake by the time he got walking alongside of it. I looked to see where he was and I saw him right alongside the machine, and I thought everything was all right. I thought there was no danger of any kind, and went back to the back of the machine and left the brake temporarily and thought it was perfectly safe to do so. I never had the horse that Twining was driving, never used it. I don't know whether I had ever seen it before. I don't remember, I know nothing about the horse whatever. All I knew [51] of my own knowledge about the horse was what I saw on that morning.

Spina had been working about a month on the harvester and before that he was running an excavator. During harvesting we pay men that drive a harvester more than an ordinary farm laborer gets. He got three dollars a day during the harvesting, and thirty dollars a month and keep other times. The harvesting generally lasts 80 to 90 days. Some of the checks are a couple of feet, and some of three *three* feet high. This check was about a couple of feet; it was rounded off. They are pretty well over the fields, and it is usual to run a harvester right over them. Spina had been driving this team over them for a month.

(Testimony of Orison Knight.)

The cart is arranged to put the feet in the bottom of the cart on a slant in front of the driver. It is a form of cart that is very frequently used in that country. It is not customary to have what is generally called a dashboard on a cart.

When Mr. Twining approached I went to the brake. It is the usual thing I do when anybody approaches the harvester. There was nothing unusual in that at all. I saw Twining after he quieted his horse down. I was not able to see him all the time from the time he came over and got his horse quieted down until I afterwards saw the horse running away. There was a part of the time when I was on the opposite side of the machine, and therefore could not see Mr. Twining on the cart. In fact, that was the condition of things when his horse started to run. Mr. Twining's horse had run about midway of the team when I first saw it, when the team was running. His horse ran about two hundred yards before he got control of it. As the team ran they turned to the [52] right. As Twining's horse run it turned somewhat to the left, so that they were converging or getting away from each other as they run. Before he got control of his horse he ran probably one hundred and fifty or two hundred yards. I don't know how much farther, that is the last I noticed it. To prevent runaways or control the teams in case of a runaway we throw the brakes on. There was one brake that I handled and there was another brake that the sack-sewer handled, and the driver had a brake also. He also has the lines to control the direction of the

(Testimony of Orison Knight.)

mules. In this case the mules changed their direction after they had run about 100 yards, and the next that I knew Spina was off his seat and down on the ground. I don't know whether he fell or jumped off, or how he got off. I did not see Mr. Twining or his horse at the time that it started to run, and I don't know what it was started Mr. Twining's horse to run. His horse started the team to run.

Redirect Examination.

The header-tender can see all around the field. The header-knife is run with a chain operated by the header-tender with a small wheel.

[Testimony of S. Salapi, for Plaintiff.]

S. SALAPI, a witness on behalf of plaintiff testified as follows:

I work with animals. I knew Pietro Spina in his lifetime. I remember the occasion when Spina was killed. I was working at Midway Camp where Spina was killed. I was employed on the harvester as header. I worked the header with a wheel. My position was on the high part of the harvester. If I chose [53] to look around, I could see in the neighborhood. I have had experience in handling mules and horses and have handled horses and mules in the old country, in Italy about five years, also in Brazil about fourteen years, and in California five years. On the day that Spina was killed, Knight, Trainor, Albano, Spina and myself were working on the harvester. Spina was driving the mule team sitting on a small seat. It was a small seat on top of

(Testimony of S. Salapi.)

the step ladder. We began working at six o'clock; Spina was killed at nine. Between six and nine the harvester passed over irrigating checks. In passing over those checks there was no runaway by the mule team. Shortly before Spina was killed I saw a boy in a cart come near the harvester. The boy was in a cart. It was a small cart. It had no brakes. It had two wheels. When I first saw the boy on that occasion in that cart he was about a quarter of a mile away back of the harvester. He was running, zigzagging before he gets there. When he got fairly close up to the harvester he turned his cart about twice around. He then got near the harvester. When he got near the harvester he was about five or six steps away. At that time when the boy was there alongside the harvester and five or six steps from it his horse was going slowly. The horse was walking.

“Q. Now, I wish you would tell me from your observation of that horse as you saw him there that morning, during the time that he was approaching the harvester, when he was going fast, as you said, making these zigzags and these two circles, down to the time you saw him walking, from what you saw of the horse that morning, I wish you would describe what kind of an animal in your opinion this horse was?”

To which question the defendant objected, on the ground that the [54] same was incompetent, irrelevant and immaterial and called for the conclusion of the witness, and no foundation laid for it; which objection the Court overruled, to which ruling the said defendant duly excepted.

(Testimony of S. Salapi.)

“A. The horse in my opinion was full of life.”

“Q. When the horse was there alongside the harvester and was walking, as you have described it, how fast were the mules going at that time?

“The mules were walking also; both the mules and the horse and cart were walking straight in the same direction. At that time while those things were so, I saw Mr. Trainor; he jumps off the harvester. He moves about two steps near the cart. I see the boy in the cart at that time. He was looking to Billy Trainor. I saw that he was talking. I could not hear the words that they said, because the harvester was making a noise. The lines from the boy's horse were lying on top, loose, on top of the single-trees. He had the ends of the lines, the extreme ends, the tips, in his left hand. He was making motions to Billy Trainor with his right hand. His left hand that held the tips of the lines was laying on his left knee at the time he was making these motions to Trainor. While that was so the horse ran at once directly to the team. When the horse reached the mules and got alongside of the mules the mules ran away, right straight ahead. The horse runs alongside the team about seventy feet and then turns to the left. The mule team ran on the right side as far as the ditch. They were stopped there. When the boy's horse started to run I saw him get hold of the line with both hands and try to hold the horse. When the mules were running I left the header.

[55]

I saw what became of Spina. He was thrown off

(Testimony of S. Salapi.)

at the time the mule team was turned on the right. When I left the header I went down a little bit, then I went to the steps again and I was going to go up to the seat. I went up there because I was trying to get hold of the lines. When I got part way up the steps I did not go the rest of the way. I could not help it, the line was dropped, fell down. When the mule team was stopped, I went back to the place where Spina was thrown off. See him there. He was dead. From my experience with mules when mules are approached from behind, from the rear, by another animal running, that would frighten the mule team. I had been working on the harvester twenty-two days before Spina was killed; during those twenty-two days, I saw Twining out there in the field near the harvester twice.

Cross-examination.

At the time this boy came up in the cart he came from behind and drove up on the left-hand side. I was on the right side. When working on the header, I turned around my face, almost all over, sideway and backway. I testified in this case at the time it was tried before.

“Q. You didn’t say anything at that time about seeing him coming across the field a quarter a mile off, did you? A. Because nobody asked me.

“Q. You didn’t testify anything at that time about how he was holding the lines, did you?

“A. I was not asked.

“Q. Didn’t you testify the last time that the first time you saw Twining in the cart was when he was

(Testimony of S. Salapi.)

right alongside of the machine? [56]

“A. Nobody asked me, otherwise I would say so.

“Q. After Twining came up in the cart and his horse was walking alongside of the machine, how far did he walk along that way? How far did the horse and cart go along, walking?

A. About 20 or 30 steps. I got down off the header but I did not get entirely off of the machine on to the ground. I stopped half way down from the seat—from the header seat.” The ladder goes right up over the horses, and I climbed out on that, a little more than half way. While the mule team was running. This was after Spina was thrown off the seat. I was going to go there to get hold of the lines. The line was still on the seat. Both of them were on the seat. The line got tangled around Spina’s body.

Counsel for defendant thereupon read in evidence, as part of the cross-examination of the witness, his testimony at the former trial, which was as follows:

Mr. DUNNE.—Q. I will ask you, by permission of counsel, a leading question, if it is not a fact that on July 1st, 1912, you were employed on the harvester at the Midway Camp of Miller & Lux as a header-tender—I think that is the correct phrase?

A. Yes, sir.

Q. And you were employed there as header-tender? A. No, sir.

Q. What were you doing on the harvester?

A. I was tending the header.

Q. Tending to the header. Now, were you there at the time that Peter Spino was killed?

(Testimony of S. Salapi.)

A. Yes, sir. [57]

Q. Now, tell us plainly and clearly all that you saw of that matter:

A. I see—What I see, I see the cart coming pretty fast and we was there close to a big, high levee. Well, when this cart was going by, the mules started to run. Well, when the mules started to run, Pietro Spina fell down from the seat between the mules.

Q. And then?

A. And the line tied up his leg, and the mules dragging him along.

Q. And then?

A. I quit the knife of the header and I tried to go up on the seat, and there was some line on the seat, and Pete Spino was under the mule.

Q. Now, when you first saw this horse and cart where was it with reference to the harvester?

A. Well, five or six steps from the harvester.

Q. In what direction was it going at that time?

A. It was going the same direction of the harvester team.

Q. At what rate of speed, as nearly as you can describe it?

A. It was going pretty fast, but I can't tell how fast it was going.

Q. Did you notice the boy that was driving the horse and cart at that time? A. Yes, sir.

Q. What was his position in the cart at that time?

A. He was holding the horse all he could, but it run away.

Q. And when you first saw this horse and cart,

(Testimony of S. Salapi.)

state whether it was abreast of the harvester or abreast of the mule team. Just at the point of time when you first saw the horse and cart was it abreast of the harvester or abreast of the mule team—perhaps a simple word would be alongside—alongside the harvester or [58] alongside the mule team when you first saw them?

A. First when I saw it, it was near the harvester, and he passed by.

Q. From what direction did that horse and cart approach the mule team? From in front, so that the mules could see it coming, or from behind, so that the mules couldn't see it coming, which way?

A. It was behind the team, in back of the team.

Q. From behind the team. Now, when the mule team ran away, what direction did it go in?

A. They turned to the right-hand side.

Q. And then where did it go?

A. They went and stopped in a ditch, a drain ditch.

Cross-examination.

Mr. TREADWELL.—Q. Did you see the cart when it first came up to get the number of sacks?

A. I seen him when he passed by, they were trying to run away, running away.

Q. Which side of the harvester were you on?

A. I was on top.

Q. Were you on the right-hand side of the left-hand side? A. I was on the right-hand side.

Q. Did you see Mr. Trainor get off and go over to the cart to give him the number of sacks?

(Testimony of S. Salapi.)

A. Yes, sir.

Q. Was the cart stopped at that time?

A. No, sir, it didn't stop.

Q. Did you see Mr. Trainor go over to the cart?

A. I say that he was going towards the cart but he couldn't go because the horse started to run. [59]

Q. After the mule team stopped running, did you say you found the lines on the seat and Spino on the ground?

A. When they started to run, I left my position and I went up there to see if I could catch the line, to turn the team back. When I was there pretty near to get the line, it fell down, the line fell down.

Q. So you couldn't get the line because it fell down? A. No. I couldn't get there in time.

Q. Was that after Spina fell or where was Spina then?

A. When I went up there and tried to get the line, Mr. Spina was down at the foot of the mule, near the wheel."

Plaintiff thereupon offered in evidence the proceedings in the matter of the estate of Peter Spino, deceased in the Superior Court of the county of Merced, to which offer defendant objected, on the ground that it appears that the proceedings are in the estate of Peter Spino, whereas this man's name is Pietro Spina, which objection the Court overruled; to which ruling defendant duly excepted.

Said proceedings were received and read in evidence and consisted of the following:

[Plaintiff's Exhibit "A"—Petition.] . .

*In the Superior Court of the State of California, in
and for the County of Merced.*

In the Matter of the Estate of PETER SPINO, De-
ceased.

PETITION.

To the Honorable, the Superior Court of the State
of California, in and for the County of Merced:

The petition of G. E. Nordgren of said county and
State respectfully represents: [60]

That Peter Spino died on or about the 1st day of
July, 1912, at the county of Merced, State of Cali-
fornia;

That said deceased at the time of his death was a
resident of the county of Merced, State of Califor-
nia;

That said deceased left estate in the said county
of Merced, State of California, consisting of certain
personal property:

That the value and character of said property are
unknown to your *petition*, but that said property
consists entirely of personal property and does not
exceed in value the sum of \$500; that all of said per-
sonal property is the common property of said de-
ceased and the widow of said deceased, who is a resi-
dent of the Kingdom of Italy and resides outside
the State of California.

That the next of kin of said deceased, and whom
your petitioner is advised and believes and therefore
alleges to be the heirs at law of said deceased are a
widow, aged 35 years, to wit, Jovetta Spino, resid-

ing in the Kingdom of Italy, and one minor child, to wit, Sunda Spino, residing with said widow in said Kingdom of Italy.

That due search and inquiry have been made to ascertain if said deceased left any will and testament but none has been found, and according to the best knowledge, information and belief of your petitioner said deceased died intestate.

That your petitioner is the public administrator of the county of Merced, State of California, and therefore as your petitioner is advised and believes is entitled to letters of administration of said deceased.

Wherefore, your petitioner prays that a day may be appointed for the hearing of this application; that due notice thereof be given by the clerk of said court by posting notices [61] according to law and that upon said hearing and the proofs to be adduced letters of administration of said estate may be issued to your petitioner.

G. E. NORDGREN,
Petitioner.

Attorney for Petitioner.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of ~~William Jones~~, Peter Spino, Deceased. Petition for Letters. Filed July 16, 1912. P. J. Thornton, Clerk. K. C. Ferguson, Deputy Clerk. Brickley & Schino, Merced, California, Attorneys for———.

*In the Superior Court of the County of Merced,
State of California.*

In the Matter of the Estate of PETER SPINO, Deceased.

Notice of Posting of Application for Letters of Administration.

C. C. P., sec. 1373.

Notice is hereby given that G. E. Nordgren having filed in this court his petition praying for letters of administration upon the estate of Peter Spino, deceased, the hearing of the same has been fixed by the clerk of said court for Friday, the 26 day of July, A. D. 1912, at 10 o'clock A. M. of said day, at the courtroom thereof, at the city of Merced, in said county of Merced, and all persons interested in said estate are notified then and there to appear and show cause, if any they have, why the said petition should not be granted and Letters issued as prayed for.

July 16, 1912.

J. P. THORNTON,
Clerk.

By _____,
Deputy Clerk. [62]

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Peter Spino, Deceased. Affidavit of Posting Notice. Filed July 22d, 1912. P. J. Thornton, Clerk.

State of California,
County of Merced,—ss.

P. J. Thornton, county clerk of the county aforesaid, being duly sworn, says that on the 16 day of

July, A. D. 19. . he posted three notices, of which the within is a true copy, in three different public places in the county of Merced, to wit: One at the place where the court is held, one at the ~~Post-office~~ Harris Bldg., Canal St. and one at the ~~Cosmopolitan Saloon~~, corner of Sixteenth Street and Huffman Avenue, in the city of Merced, in said county.

P. J. THORNTON,

Subscribed and sworn to before me this 22d day of July A. D. 1912.

W. B. CROOP,
Justice of the Peace.

*In the Superior Court of the County of Merced,
State of California.*

In the Matter of the Estate of PETER SPINO, Deceased.

Order Appointing Administrator.

The petition of G. E. Nordgren praying for letters of administration on the estate of Peter Spino, deceased, coming on regularly to be heard; and due proof having been made to the satisfaction of this court, that the clerk had given notice in [63] all respects according to law; and all and singular the law and the evidence being by the Court understood and fully considered. Whereupon it is by the Court here adjudged and decreed that the said Peter Spino died on the 1st day of July, A. D. 1912, intestate, in the county of Merced, that he was a resident of Merced County, Cal., at the time of his death, and that he left estate in the county of Merced, State of

Cal. and within the jurisdiction of this court.

IT IS ORDERED, that letters of administration of the estate of the said ~~C. E. Nordgren~~ Peter Spino, deceased, issue ~~to the said petitioner~~ issued to G. E. Nordgren ~~upon taking the oath and filing a bond according to law, in the sum of dollars upon his taking the oath.~~

GEO. E. CHURCH,

Judge of the Superior Court.

Dated July 26th, A. D. 1912.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Peter Spino, Deceased. Order Appointing Administrator Filed July 26, A. D. 1912. P. J. Thornton, Clerk.

[Further Endorsed]: Recorded July 26, 1912, in book I, page 308, of Probate Minutes by K. C. Ferguson, Clerk.

*In the Superior Court of the County of Merced,
State of California.*

In the Matter of the Estate of PETER SPINO, Deceased.

Letters of Administration.

State of California,
County of Merced,—ss.

G. E. Nordgren is hereby appointed administrator

of the [64] estate of Peter Spino, Deceased.

WITNESS: P. J. THORNTON,

Clerk of the Superior Court of the County of Merced, with the Seal Thereof Affixed, the 26th day of July, A. D. 1912.

By order of the Court.

P. J. THORNTON,

Clerk.

By K. C. Ferguson,

Deputy Clerk.

State of California,

County of Merced,—ss.

I, C. E. Nordgren do solemnly swear that I will faithfully perform, according to law, the duties of *administrat* of the estate of Peter Spino, deceased.

G. E. NORDGREN.

Subscribed and sworn to before me, this 26th day of July, A. D. 1912.

[Seal]

P. J. THORNTON,

Clerk.

By K. C. Ferguson,

Deputy Clerk.

[Indorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Peter Spino, deceased. Letters of Administration Issued to G. E. Nordgren, on the 26th day of July, A. D. 1912. Filed July 26, A. D. 1912. P. J. Thornton, Clerk.

*In the Superior Court of the State of California, in
and for the County of Merced.*

In the Matter of the Estate of PIETRO SPINA,
Sometimes Known as PETER SPINO, deceased.
[65]

**Petition for Revocation of Letters of Administra-
tion.**

To the Honorable, the Superior Court of the State
of California, in and for the County of Merced:

Now comes Saverio di Giovanni Petrocelli, of the
county of Merced, State of California, and respect-
fully presents this his petition, showing:

I.

That Pietro Spina, sometimes known as Peter
Spino, died on or about the first day of July, 1912, in
said county of Merced, in the State of California.

II.

That said Pietro Spina, sometimes known as Peter
Spino at the time of his death was a resident of said
county and State, and left estate in said county and
State, the exact character and probable value
whereof this petititner does not known, and is not
able to state.

III.

That the heirs at law of said deceased are as fol-
lows, to wit:

Names.	Relationship.	Residence.
Giuditta di Giovanni Petrocelli Spina,	Surviving widow of deceased.	Moliterno, Kingdom of Italy.
Assunta Spina,	Daughter of de- ceased.	Moliterno, Kingdom of Italy.

IV.

That on the 26th day of July, 1912, said Court made and gave its order appointing G. E. Nordgren, then and now the duly elected, qualified and acting public administrator of the county of Merced, State of California, as administrator of the estate of said deceased; that, in pursuance to said order, letters of [66] administration were issued to said G. E. Nordgren as such administrator; and that said G. E. Nordgren duly qualified and received said letters, and thereupon assumed the duties of such administrator and is now the administrator of, and administering said estate.

V.

That your petitioner is a competent person, and is a relative by blood of the surviving wife of said deceased, to wit, a brother, and is competent to act as and perform the duties of administrator of said estate of said deceased; and that said surviving wife of said deceased has, in writing, requested your petitioner, such competent person, to obtain the issuance of letters of administration upon said estate to him, the said petitioner, and to assume the duties of administrator of said estate, and to administer the same, and said request is contained and set forth in those two certain powers of attorney which are hereto attached, made a part hereof, hereby expressly referred to, and marked exhibit "A" and "B"; and in this behalf this petitioner shows that the original of said exhibit "A" is in the Italian language, and that said exhibit "A" is a full, true and correct translation into English of said original; and

that the original of said exhibit "B" is in the English language.

WHEREFORE, your petitioner respectfully prays that the letters of administration heretofore issued to the said G. E. Nordgren be revoked, and that letters of administration upon the estate of said deceased be issued to your petitioner.

SAVERIO di GIOVANNI PETROCELLI,

Petitioner. [67]

J. J. DUNNE,

MERCER H. FARRAR,

Attorneys for said Petitioner.

State of California,
County of Merced,—ss.

Saverio di Giovanni Petrocelli, being first duly sworn, deposes and says: that he is the petitioner named in the foregoing petition; that said petition has been read and translated to him, and that he knows the contents thereof; that said petition he knows to be true of his own knowledge, except as to the matters therein stated on information or belief, and that as to such matters he believes it to be true.

SAVERIO di GIOVANNI PETROCELLI.

Subscribed and sworn to before me this 25th day of January, 1913.

[Seal]

JAMES V. TOSCANO,

Notary Public in and for said County and State.

EXHIBIT "A"

L

D

VIGNETTE

D

2

Province of
Potenza

No. of Rep. Not. 347

Id. of Reg. 167.

Aumento
del Due
Per Cento [68]

Special Power of Attorney.

King Victor Emanuel III reigning by the Grace
of God and the will of the Nation,

KING OF ITALY;

In the year one thousand nine hundred and twelve,
1912, this thirty-first, 31 of July, in Moliterno, in the
house of Giuditta Petrocelli, at No. 9 Seggio Street;
Before me, Giulia Gargia, (son) of the late Fran-
cesco, notary here residing and registered in the no-
tarial office of the district of Lagonegro; and in the
presence of Petrocelli Domenico, (son) of Saverio,
cooper, and Melillo Domenico, (son) of Vincenzo,
cooper, witnesses known, competent and requested,
and born and domiciled in Moliterno

APPEARED

Giuditta di Giovanni Petrocelli, widow of Spina,
housewife, born and domiciled in Moliterno, to me
and to the witnesses known and qualified, who ap-

pears in her own name and as legal representative of her minor child, Assunta Spina, daughter of the late Pietro Spina; the aforesaid declares to me that on the first of the expiring month of July, in Los Banos, California, she had the misfortune to lose her husband, Pietro Spina, (son) of Saverio, born in Moliterno, who was mangled by a threshing machine upon which he was working; that the sad fact, besides having bereaved the one who here appears of her husband, and the daughter of her father, has taken from them their only support and means of subsistence since they depended for their living solely upon the remittances which the deceased punctually sent to them. [69]

Now, since she cannot personally betake herself to a country so distant in order to liquidate the damages and indemnities that may belong to her, the aforesaid Giuditta Petrocelli, by this public act, nominates and constitutes as her special attorney in fact Mr. Saverio di Giovanni Petrocelli, residing in Los Banos, whom she empowers as attorney in fact to liquidate by amicable means or by judicial procedure before competent authorities, the damages and indemnities which are coming to her for the death of the said Pietro Spina, from the proprietor under whom he worked or from the company by whom the deceased may have been insured.

She confers for such purpose all the powers and authorities necessary and allowed by law, none excepted or excluded, for the accomplishment thereof, with authority and power to represent her in all steps and matters appertaining thereto, and ex-

pressly to transact and compromise and receive money, giving the proper receipts and releases to whomsoever is thereto entitled; and to represent her in judicial tribunals for the liquidation of the said indemnities and damages.

She declares that even from now, and without requiring any other documents she approves and ratifies the doings of said attorney in fact regarding such matters.

I, the notary, having been requested, executed this document, which, being subscribed, I read in a clear and intelligible voice in the presence of the witnesses and of the said Giuditta Petrocelli, and she being interrogated, approved and confirmed the same.

By me written and drawn, the document is contained in this only folio with seal of which there are two written pages [70] and this third page to this point of twenty-one lines.

GIUDITTA PETROCELLI.

MELILLO DOMENICO.

PETROCELLI DOMENICO.

[Seal of said Notary.] GIULIO GARGIA,
Notary in Moliterno.

[Stamp and Seal.]

Vised for Legalization of Signature of Mr. GIULIO GARGIA, Notary in Moliterno.

Lagonegro — 3-8-1912.

The President

[Stamp and Seal] PERRONE.

A. SORRENTO, Consul.

Minister of the Department of Justice.

Vised for Legalization of the Signature of Pres-

ident Perrone, Rome, August 9, 1912, Department of Justice, M. de CESARE.

[Stamp and Seal]

Minister of Foreign Affairs here attests the authenticity of the signature of M. de Cesare, Rome, August 9, 1912, Office of the Minister, V. Morone.

Kingdom of Italy,

City of Rome,—ss.

I, the undersigned, Vincenzo de Masellis, *Counsel* of the United States of America, at Rome, Italy, do hereby certify that V. Morone who has signed and sealed with the official seal of office, the annexed authentications of signature, was at the time of so doing and is, the duly appointed representative of the Ministry of Foreign Affairs of Italy, that his signature thereto as such is true and genuine and is entitled to full faith and credit.

In witness whereof I have hereunto set my hand and affixed my official seal this 13th day of August, 1912.

VICENZO de MASELLIS,

Deputy Consul of the United States of America, at

Rome, Italy, No. 502.

[Seal of American Consulate, Rome, Italy.]

[Seal and Stamp of American Consulate, Rome, Italy.] [71]

[Exhibit "B"—Supplemental Power of Attorney.]

KNOW ALL MEN BY THESE PRESENTS:
That I, *Guiditta di Giovanni Petrocelli Spina*, of

Moliterno, Italy, in further confirmation and ratification of my prior power of attorney to Saverio di Giovanni Petrocelli, executed at said Moliterno, on July 31, 1912, before Giulio Gargia, Notary in said Moliterno, and whereunto I have signed my name "Giuditta Petrocelli," have appointed and do hereby appoint said Saverio di Giovanni Petrocelli as my attorney in fact for me and in my name, to execute, transact and carry out and perform all and singular the matters, business and things in my said prior power of attorney referred; and in addition thereto, to become and be the duly appointed, substituted, qualified and acting administrator of the estate of Pietro (sometimes known as Peter) Spina, my deceased husband; and the more effectually to carry out my wishes in the premises, I hereby request the Superior Court for the State of California in and for the county of Merced, and all and every other court or courts having jurisdiction to appoint my said attorney in fact, above named, as such administrator of said estate of my said deceased husband, and to substitute my said attorney in fact as such administration in the place and stead of any other person whatever to whom letters of administration upon said estate may have heretofore been issued; and in particular to substitute my said attorney in fact as such administrator in the place and stead of G. E. Nordgren, public administrator of said county of Merced, and I, the surviving wife, and now the widow, of said Pietro (sometimes known as Peter) Spina, do hereby make this written request that my said attorney in fact be appointed such administra-

tor, under and pursuant to [72] the terms and provisions of the Code of Civil Procedure of the State of California, and more particularly section 1365 of said code.

Giving unto my said attorney authority to do whatever is necessary to be done in and about the aforesaid business, as fully as I could do if personally present, and hereby ratifying all that my said attorney shall do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand, the Moliterno day of 23 November, 1912, one thousand nine hundred and twelve.

GUIDITTA di GIOVANNO.
PETROCELLI SPINA.

Signed and delivered in the presence of
GIULIA GARGIA,
Notary in Moliterno.

[Seal of Giulio Gargia, Notary in Moliterno.]

[Endorsed]: Supplemental Power of Attorney. Giuditta di Giovanni Petrocelli Spina to Saverio di Giovanni Petrocelli.

Dated November 23, 1912.

[Stamp and Seal]

Vised for Legalization of Signature of Mr.
GIULIO GARGIA,
Notary in Moliterno.

Logonegro 13-12, 1912.

The President.
PERRONE.

Cafarelli

Aggt.

Form No. 88a.

United States Consulate,

Naples, Italy, December 27th, 1912. [73]

I, William W. Handley, counsul of the United States of America, at Naples, Italy, do hereby certify that the signature and seal of the President of the Tribunal of Lagonegro, Province of Potenza, Kingdom of Italy, on the paper hereunto annexed are true and genuine and as such entitled to full faith and credit.

IN WITNESS WHEREOF: I have hereunto set my hand and affixed the seal of the Consulate at Naples, Italy, the day and year next above written.

W. W. HANDLEY,

Consul of the United States of America, Naples, Italy.

[Seal of United States Consulate, Naples, Italy.]

(Fee)

(Stamp)

(American Consular)

(Service)

(N)

(588)

Upon reading and filing the foregoing petition, I hereby fix the hearing of the same by the Court, upon Monday the 17 day of Feb. A. D. 1913, at 10 o'clock A. M. of said day, at the courtroom of said court, at the courthouse, in the city of Merced, as the time and place for such hearing.

Dated Jan. 30, 1913.

P. J. THORNTON,
Clerk of said Superior Court,

By _____,
Deputy.

[Endorsed]: No. 892 (Probate), Superior Court, County of Merced. In the Matter of the Estate of Pietro Spina, sometimes known as Peter Spino, deceased. Petition for Revocation of Letters of Administration, Original. Filed Jan. 30, 1913. P. J. Thornton, County Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Petitioner. [74]

*In the Superior Court of the State of California, in
and for the County of Merced.*

In the Matter of the Estate of PETER SPINO,
Deceased.

Notice of Hearing.

Saverio di *Giovanni* Petrocelli, a brother of the surviving wife of said deceased, and brother-in-law of said deceased, having filed in this court a petition praying that letters of administration upon the estate of said deceased, heretofore issued to G. E. Nordgren be revoked, and that such letters be issued to petitioner, who claims a prior right thereto;

Notice is hereby given that the matter will be heard on Monday, the 17th day of February, A. D. 1913, at the courtroom of said court, in the courthouse in county of Merced, State of California, at 10 o'clock in the forenoon of that day, and all persons interested in said estate are notified to appear

then and there, and show cause, if any they can, why petitioner's prayer should not be granted.

Dated this 30th day of Jan. A. D. 1913.

P. J. THORNTON,
Clerk of said Court.

Deputy Clerk.

[Endorsed]: No. 892 (Probate). Superior Court County of Merced. In the Matter of the Estate of Pietro Spina, sometimes known as Peter Spino, Deceased. Notice of Hearing. Filed, Jan. 30, 1913. P. J. Thornton, County Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Petitioner. [75]

Office of the
Sheriff of the County of Merced,
State of California.

I, S. C. Cornell, Sheriff of the county of Merced, do hereby certify that I served the within citation on the within-named G. E. Nordgren, by delivering to said G. E. Nordgren, personally a copy thereof on the 30th day of January, 1913.

S. C. CORNELL,
Sheriff of the County of Merced.

Dated at Merced, Cal., this 30th day of January, 1913.

*In the Superior Court of the State of California, in
and for the County of Merced.*

In the Matter of the Estate of PETER SPINO,
Deceased.

Citation to Show Cause.

The People of the State of California, to G. E. Nordgren, Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased: Greetings:

By order of this Court, you, the said administrator of the estate of said deceased, are hereby cited to appear before said Superior Court of the State of California, in and for the county of Merced, at the courtroom thereof, in the courthouse in the county of Merced, in the State of California on Monday, the 17th day of February, A. D. 1913, at 10 o'clock, in the forenoon of said day, and show cause, if any you can, why your [76] letters of administration should not be revoked, and Saverio di Giovanni Petrocelli, brother of the surviving wife of said deceased, and brother-in-law of said deceased, be appointed as such administrator in your place and stead.

IN WITNESS WHEREOF, I, P. J. Thornton, Clerk of the said Superior Court aforesaid have hereunto set my hand and affixed the seal of said court this 30th day of January, A. D. 1913.

[Seal]

P. J. THORNTON,
Clerk of said Court.

Deputy Clerk.

[Endorsed]: No. 892 (Probate). In the matter of the Estate of Pietro Spina, sometimes known as Peter Spino, Deceased. Citation to Show Cause. Received 3:30 P. M., Jan. 30, 1913. S. C. Cornell, Sheriff. Filed Jan. 30, 1913. P. J. Thornton, County Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Petitioner.

*In the Superior Court of the State of California, in
and for the County of Merced.*

In the Matter of the Estate of PETER SPINO,
Deceased.

Notice of Hearing.

Saverio di Giovanni Petrocelli, a brother of the surviving wife of said deceased, and brother-in-law of said deceased, having filed in this court a petition praying that letters of administration upon the estate of said deceased heretofore issued to G. E. Nordgren, be revoked, and that such letters be issued to petitioner, who claims a prior right thereto. [77]

Notice is hereby given that the matter will be heard on Monday, the 17th day of February, A. D. 1913, at the courtroom of said court, in the courthouse in the county of Merced, State of California, at 10 o'clock in the forenoon of that day, and all persons interested in said estate are notified to appear then and there, and show cause, if any they can, why petitioner's prayer should not be granted.

Dated this 30th day of Jan., A. D. 1913.

[Seal]

P. J. THORNTON,
Clerk of said Court.

Deputy Clerk.

State of California,
County of Merced,—ss.

P. J. Thornton, county clerk of the county of Merced, State of California, being duly sworn, says that on the 30th day of January, 1913, he posted three notices, of which the foregoing is a true copy, in three different public places in the county of Merced, to wit: One at the place where the court is held, one at the postoffice, and one at the N. E. corner of 16th St. and Huffman Avenue, in the city of Merced, in said county.

P. J. THORNTON.

Subscribed and sworn to before me this 31 day of Jan., 1913.

W. B. CROOP,
Justice of the Peace.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Pietro Spina, Affidavit of Posting Notice. Filed Jan. 31, A. D. 1913. P. J. Thornton, Clerk. [78]

*In the Superior Court of the State of California in
and for the County of Merced.*

In the Matter of the Estate of PIETRO SPINA,
Sometimes Known as Peter Spino, Deceased.

**Order Revoking Letters of Administration and
Appointing Administrator.**

Whereas, on the 30th day of January, 1913, Saverio di Giovanni Petrocelli, a brother of Giuditta di Giovanni Petrocellia Spina, surviving wife of Pietro

Spina, deceased, having filed this petition in writing in the above-entitled matter, praying that G. E. Nordgren, the administrator heretofore appointed herein by this Court be removed, and that the letters of administration heretofore on the 26th day of July, 1912, issued to said G. E. Nordgren, be revoked and annulled for *an* on account of the reasons and grounds therein stated, and further praying that petitioner or some other fit and proper person be appointed as administrator of said estate of Peitro Spina, sometimes known *known* as Peter Spino, deceased;

And said petition coming on regularly for hearing by the Court this 17th day of February, 1913, proof having been made to the satisfaction of the Court that the clerk had given notice of said hearing as required by law, and that said administrator G. E. Nordgren was duly cited to appear and show cause, if any he had why letters of administration heretofore issued to him should not be revoked, and J. J. Dunne and Mercer H. Farrar [79] appearing as attorneys for petitioner, and Messrs. J. J. Griffin and H. Brickley appearing as attorneys for the administrator, said G. E. Nordgren; and said G. E. Nordgren by his said attorneys in open court consenting and agreeing to the revoking of the letters of administration heretofore issued to him and the appointment of said Saverio di Giovanni Petrocelli as administrator, in the above-entitled matter, and evidence oral and documentary having been introduced said matter was submitted to the Court for decision.

Now, therefore, the Court, after due deliberation on all the evidence adduced and the law in such case

made and provided, find that said G. E. Nordgren should be removed from the office of administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, and that his letters of administration heretofore issued as aforesaid should be revoked, annuled and vacated on the grounds that he is not the person rightfully entitled thereto by law and that the said Saverio di Giovanni Petrocelli is the brother of the lawful wife of the above-named deceased, and that said wife in writing has duly waived her right to act as administrator in said estate and requested the appointment of said petitioner as said administrator.

It is Therefore Hereby Ordered, Adjudged and Decreed, the said G. E. Nordgren be, and he is hereby removed from the office of administrator of said estate of said Pietro Spina, sometimes known as Peter Spino, deceased, and that said letters of administration issued to him on the 26th day of July, 1912, are hereby revoked, vacated and annuled.

It is Further Ordered, that letters of administration upon the estate of Pietro Spina, sometimes known as Peter Spino, deceased, issue to Saverio di Guovanni Petrocelli, the duly elected, appointed administrator of said estate upon his taking the oath [80] as required by law, and filing herein his bond in the sum of one hundred dollars as required by law.

Dated February 17, 1913.

E. N. RECTOR,
Judge of the Superior Court.

[Endorsed]: No. 892. Superior Court, County of Merced, in the Matter of the Estate of Pietro Spino, Sometimes Known as Peter Spino. Order Revoking

Letters of Administration and Appointing. Filed Feb. 17, A. D. 1913. P. J. Thornton, Clerk.

[Further Endorsed]: Recorded Feb. 17, 1913, in Book I, page 376 of Probate Minutes. By K. C. Ferguson, Deputy Clerk.

In the Superior Court of the County of Merced, State of California.

PROBATE.

In the Matter of the Estate of PIETRO SPINO,
Sometimes Known as Peter Spino, Deceased.

[Order Granting Letters of Administration.]

The petition of Saverio di Giovanni Petrocelli, praying for letters of administration on the estate of Pietro Spino, sometimes known as Peter Spino, deceased, coming on regularly to be heard; and due proof having been made to the satisfaction of this Court, that the clerk had given notice in all respects according to law; and all and singular the law and the evidence being by the Court understood and fully considered. Whereupon [81] Pietro Spino, sometimes known as Peter Spino, died on the 1st day of July, A. D. 1912, intestate, in the county of Merced, that he was a resident of Los Banos, Merced County, California, at the time of his death, and that he left estate in the county of Merced, State of California, and within the jurisdiction of this Court.

It is ordered, that letters of administration of the estate of the said Pietro Spino, sometimes known as Peter Spino, deceased, issue to the said petitioner, Saverio di Giovanni Petrocelli, upon his taking the

oath and filing a bond according to law, in the sum of one hundred (\$100) dollars.

E. N. RECTOR,
Judge of the Superior Court.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Pietro Spino, Sometimes Known as Peter Spino, Deceased. Order Appointing Administrator. Filed Feb. 17, A. D. 1913. P. J. Thornton, Clerk. J. J. Dunne and Mercer H. Farrar, Attorneys for Administrators.

[Further Endorsed]: Recorder Feb. 17, 1913, in Book I, page 371, of Probate Minutes. By K. C. Ferguson, Deputy Clerk. [82]

In the Superior Court of the County of Merced, State of California.

In the Matter of the Estate of PIETRO SPINO,
Sometimes Known as Peter Spino, Deceased.
State of California,
County of Merced,—ss.

[Appointment of Administrator.]

Saverio di Giovanni Petrocelli is hereby appointed administrator of the estate of Pietro Spino, sometimes known as Peter Spino, deceased.

Witness: P. J. THORNTON,
Clerk of the Superior Court of the County of Merced,
with the Seal Thereof Affixed the 17th day of
February, A. D. 1913.

By order of the Court.

P. J. THORNTON,
Clerk.

State of California,
County of Merced,—ss.

[Oath of Administrator.]

I, Saverio di Giovanni Petrocellio, do solemnly swear that I will faithfully perform according to law, **the duties of *administrat***— of the estate of Pietro Spino, sometimes known as Peter Spino, deceased.

Subscribed and sworn to before me this 17th day of Feb., A. D. 1913.

SAVERIO DI GIOVANNI PETROCELLI.

[Seal]

P. J. THORNTON,

Clerk. [83]

No. 892. Records M. B., 4 page 229, Superior Court, County of Merced. In the Matter of the Estate of Pietro Spino, Sometimes Known as Peter Spino, Deceased. Letters of Administration. Issued to S. di G. Petrocellio on the 17 day of Feb., A. D. 1913. Filed Feb. 17, A. D. 1913. P. J. Thornton, Clerk.

[Bond of Administrator.]

KNOW ALL MEN BY THESE PRESENTS :

That we, Saverio di Giovanni Petrocelli, as principal and Dominic Toscano and James Negra, as sureties, are held and firmly bound to Giuditta Spina and Assunta Spina in the sum of one hundred (\$100) dollars lawful money of the United States of America, to be paid to the said Giuditta Spina and Assunta Spina for which payment well and truly to be made, we bind ourself, our and each of our heirs, executors

and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 17th day of February, 1913.

The condition of the above obligation is such, That whereas, by an order of the Superior Court in and for the county of Merced, State aforesaid, duly made and entered on the 17th day of February, A. D. 1913, the above-bounden Saverio di Giovanni Petrocelli, was appointed administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, and letters of administration were directed to be issued to him upon his executing a bond according to law in said sum of one hundred (\$100) dollars.

Now, therefore, the said Saverio di Giovanni Petrocelli as such administration shall faithfully execute the duties of the trust according to law, then this obligation shall be void; [84] otherwise to remain in full force and effect.

SAVERIO DI GIOVANNI PETROCELLI.

D. TOSCANO. [Seal]

JAMES NEGRA. [Seal]

State of California,
County of Merced,—ss.

Dominic Toscano and James Negra, the sureties in the above bond, being duly sworn, each for himself says that he is a freeholder and resident within the said State, and is worth the said sum of one hundred (\$100) dollars, over and above all his debts and lia-

bilities, exclusive of property exempt from execution.

D. TOSCANO.

JAMES NEGRA.

Subscribed and sworn to before me this 17 day of
Feb., A. D. 1913.

[Seal]

P. J. THORNTON,
County Clerk.

[Endorsed]: No. ——. Superior Court, County of
Merced. Bond of Saverio di Giovanni Petrocelli,
Given upon Qualifying. Approved this — day of
——, A. D. 19——. Endorsed on Back: No. 892.
Recorded P. B. B. 2 page 438. Superior Court,
County of Merced. In the Matter of the Estate of
Pietro Spino, etc., Deceased. Bond of Administra-
tor (Saverio di Giovanni Petrocelli) Given upon
Qualifying. Approved this 17th day of Feb., 1913.
E. N. Rector, Judge of the Superior Court. Filed
Feb. 17, 1913. P. J. Thornton, Clerk. [85]

All enclosed in a cover endorsed:

No. 892. Probate. In the Superior Court,
County of Merced, State of California. In the Mat-
ter of the Estate of Peter Spino, Deceased. Filed
July 16, 1912. P. J. Thornton, By K. C. Ferguson.
Deputy Clerk.

Also on cover:

No. 42 Cir. U. S. Dist. Court, So. Dist. of Cal.
No. Div. Petrocelli vs. Miller & Lux, Pls. Exh. 1.
Filed May 8, 1914. Wm. M. Van Dyke. By Leslie
L. Colyer, Deputy.

[Endorsed]: No. 892. Probate. Superior Court,
County of Merced, State of California. In the Mat-

ter of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased. Copy Probate Record.

42 Civ. U. . Dist. Court. So. Dist. of Cal. No. Div. Petrocelli, etc. vs. Miller & Lux, Inc. Pl's Exh. A. Filed May 17, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [86]

Mr. DUNNE.—By stipulation of counsel, I read into the record as evidence in this cause from the American Experience Table of *Mortality*, the facts that the expectation of life of a person 36 years of age is 31.07 years and the expectation of life of a person of 31 years of age is 34 years and .63.

The COURT.—How many days is .07?

Mr. DUNNE.—.01 of a year would be three days and .65, and 7 times that would be something like 24 or 25 days.

The COURT.—The age of the deceased was 36?

Mr. DUNNE.—I was going to prove that. And the widow was 31 on the first of July, 1912.

The COURT.—And any children in the case?

Mr. DUNNE.—Yes, sir. I propose to call the widow now and prove those facts by her.

Mr. TREADWELL.—She testified before. I am perfectly willing to let her testimony go in as it is.

Mr. DUNNE.—That will save the necessity of calling her. By consent of counsel I will read in evidence to you, gentlemen, the testimony of the widow, as given upon the former trial, which reads as follows: [87]

[Testimony of Mrs. Giuditta Petrocelli (Given at Former Trial), for Plaintiff.]

Mrs. GIUDITTA PETROCELLI, a witness on behalf of plaintiff, testified as follows:

A. G. Laverone acting as interpreter:

My name is *Guiditta* Petrocelli. I knew Peter Spino (or Pietro Spina) in his lifetime; I was his wife. We were married in Moliterno, Italy, thirteen years ago. He was 36 years old at the time of his death. I was 31 years old at the time he died. My husband supported me during his lifetime; that is all, he had nothing else. Just all I got was just whatever my husband used to send me. He sent me about \$250 a year. He left Italy to come to the United States seven years ago. I left Italy on the 25th of December, to come to the United States. I arrived in New York on the 12th of January, and got to California on the first of May. During the seven years that my husband was here in the United States up to the time of his death, he sent me \$250 a year on the average all the time. I have one child, Assunta Spina, ten years old on the 15th of next August.

(Plaintiff rests.)

[Motion for a Nonsuit (Grounds of).]

Defendant thereupon moved for a nonsuit on the following grounds:

First, that there is no evidence to sustain the allegation of the complaint that the deceased came to his death by reason of any negligence or any wrongful act on the part of the defendant.

Second, that there is no evidence to support the

claim [88] of the complaint, that the defendant was guilty of negligence in failing to provide the decedent with a reasonably safe place to work.

Third, that there is no evidence to support the allegation of the complaint that the defendant was guilty of negligence in using or permitting to be used any vicious animal, or that the animal in question was in any way vicious or improper to be used, under the circumstances.

Fourth, that there is no evidence sufficient to justify the claim of the complaint that the defendant permitted the mule team to be approached, without any care, or without any effort to control the horse in question; but, on the contrary, the undisputed evidence shows that due care was used to control the horse in question.

Fifth, generally, that there is no evidence of any kind in the record showing any negligent act of the defendant which in any way contributed or caused the death of the decedent.

After argument, the Court denied said motion, to which ruling the defendant duly excepted. [89]

[Testimony of D. W. Wallis, for Defendant.]

D. W. WALLIS, a witness on behalf of the defendant, testified as follows:

I am manager for Miller & Lux, and have been employed by them for about sixteen years; during that time I have been in the San Joaquin Valley, superintendent of the Los Banos Division a portion of the time, up to two years ago. I have been familiar with farming operations and have been engaged in that business for about thirty-five years. For the

(Testimony of D. W. Wallis.)

last twenty-five years I have had charge of farming operations, and am familiar with the methods used in the valley and throughout the State in harvesting grain.

The property was known as Midway Camp; was under my general supervision at the time of the accident. I am familiar with the harvesters that were used at that time.

Q. Is that the form of harvester generally used throughout the valley and throughout the State in harvesting grain?

A. This was a Holt harvester. There are more Holt harvesters used than any other harvester in the State.

The harvester is equipped with a place for the driver to sit. It is situated right over the wheel horses. It is reached by a number of boards nailed across for a ladder. It goes up to the seat, and the driver goes up that ladder, you might call it. There is a place for the driver's feet and a place for his whip; there is a brake for the driver to operate. He controls the leaders with a pair of lines.

I am familiar with the manner in which fields are checked. This was an irrigated field. It is checked in 4" contours. The levee is about 6" for a 4" contour. You would have your levees about 6" in height. Of course they are made so that you can run over them with a mowing machine or any kind of machinery, made [90] so that you go over them like you would a bank in a road, or something.

I know Mr. Fred Twining. He was in the employ

(Testimony of D. W. Wallis.)

of the company at the time of this accident. His duties were to go to each harvester and find out how much grain they had harvested and get the number of sacks.

I am familiar with the horse he was driving at the time of the accident. I do not know how old a horse it was. I think the horse was six or seven years old. I don't know the exact age, because we have so many horses, I don't pay any particular attention to the age. We had it on the ranches for some little time; I know the painters had been using it. It had been on the ranch perhaps 2-3 years. I did not know anything about, ever hear about the horse being in any way vicious, or anything of that kind. I know that the painters used the horse. I know the horse was driven by the painters, and then it was driven by this boy to the machine, and afterwards driven by Mr. Miller, the foreman. I never knew of the horse being vicious, fractious, or liable to run away, or anything of that kind. The horse was "good life," but, on the contrary, would stand around without being hitched, tied up.

The duty of the driver of the harvester is to drive the harvester and watch his team, and if anything happens to scare the team he is supposed to put on his brake and keep the team straight, or circle them, if it is better to circle them. He has to use his judgment about it. He can most assuredly, and with the lines he is supplied with. The leaders control the team, and if the leaders are controlled, the team is controlled. [91]

(Testimony of D. W. Wallis.)

If the brakes are set the machine stops, and that acts like a plow, it digs into the ground; it will dig a ditch, if they go on with the machine. It is not possible for a team to run any considerable distance if the brakes are set; they cannot run a great distance. They might run a short distance, but they cannot run very far, if they did the ground would be all plowed up where they ran. I have driven myself a great deal, a long time, I hate to tell how long. I have been in a good many runaways in my time.

Q. And if a man is driving, and holding on to the lines, as he should, even if he does fall off, does he leave the lines drop on the seat, or take them down with him? A. I always took them with me.

Q. Now, in your long experience, Mr. Wallis, with people driving these combined harvesters, what has been your experience as to the safety of the place where the man sits that drives the harvester?

The Court sustained the objection of plaintiff to the foregoing question.

Q. Well, during the long experience you have had with these harvesters and the men driving them, have you known of a man being killed, driving?

Mr. DUNNE.—That is objected to as immaterial.

The COURT.—I will sustain the objection, I think, Mr. Treadwell, that the inquiry is limited as to whether that is the usual and ordinary way of construction and operation of the machine.

Mr. TREADWELL.—He has already testified to that, and I will agree to that myself. That is all; that will be all. [92]

(Testimony of D. W. Wallis.)

Cross-examination.

The ladder approaches at a certain angle over the wheels, over the front wheel, so to speak of the harvester. Between the two horses is a pole or tongue, and the ladder is at an angle of about 45° , the lower end of which is attached to the frame of the machine. There is a single wheel in front that is attached to the harvester. When the harvester moves to the right or left the ladder moves to the right or left of the machine. As a rule those ladders are about 10-12 feet high, might be a little longer or a little shorter, but it takes a man so he is over his wheelers about midway of the horses. I could not say they ever run as long as 18 feet. I never measured one; I am just guessing at it. I was not at the scene of this accident at the time that it occurred. I know the horse that the boy was using. I do not know of my own knowledge the particular horse the boy was using that morning from seeing the horse myself, but I know from my own knowledge, from information that I have received.

Q. So that the basis then of the answer that you gave here was information you got from other people, isn't that so?

A. Not about the horse, about him using it that day; because the horse I know perfectly well, and know the men that used it.

Q. So that the basis of your answer then as to the horse that the boy was using that day is information that you obtained from other people?

A. I didn't see him that day, no. I could not say

(Testimony of D. W. Wallis.)

whether I did or not see him most every day. It is so long ago I could not say. I must have seen him that day or the day after because at the time of the accident I think I was away from home. I don't remember exactly now. It is a number of years ago.
[93]

I don't think I was on the ranch on the day of the accident. I have an office on the ranch about four and a half miles from the place of the accident. I do not recollect meeting the boy Twining in my office two or three days after the accident. I do not recollect having the conversation with Mr. Knight in the presence of this boy Twining as to how this accident happened. Most likely I did, but I don't remember having the two of them together. Of course after the accident, immediately, we inquired into all the details of it, naturally would, but I have no recollection now of what if anything was said at that time.

Redirect Examination.

I identify the horse by knowing the horses as I have charge of all the horses in the country there. I know each horse that is handled around by different people, what they will do, and so forth. It was a little brown mare, about 8 or 900 pounds; she is small. I think Twining told me himself that that was the horse that he was driving that morning.

Recross-examination.

I do not recollect when it was that Twining told me that; must have told me as soon as I saw him, but it is some four years ago. I do not recollect anything else Twining told me, nothing more than they

(Testimony of D. W. Wallis.)

had a runaway and that he came in and went back and saw the man was dead, and went back and hunted up somebody to go after him, and came right on in to the ranch and notified the foreman. Mr. Twining told me that he went to where the man was killed, and then went and told the foreman, and then came to town. [94]

[Testimony of C. K. Safford, for Defendant.]

C. K. SAFFORD, a witness on behalf of the defendant, testified as follows:

I reside in Merced County, on the west side, Delta Division. I work for Miller & Lux and have been employed by the company 13 or 14 years. I have lived in the valley thirty years. I am familiar with farming operations, including the harvesting of grain; have had charge of combined harvesters that are used for that purpose. I have seen a good many Holt harvesters; those harvesters are the harvesters used throughout this country in harvesting grain. I know where the seat of the driver is situated, and how it is constructed, and it is the usual and ordinary method of handling harvesters in this country. The duty of the driver in case of an accident, in case the horses or mules become restive, or anything of that kind, is to put on his brake and stop his team. He also has the lines for controlling the team. I know the horse that Fred Twining was driving the morning of this accident—well, I suppose it is the same horse. I think I have known the horse for 7 or 8 years. It has been in the use of the company during all that time. I had this horse at one time at the Henderson

(Testimony of C. K. Safford.)

place. It has also been used around Canal Farm, Los Banos Farm.

On the Henderson place the irrigators used it in the cart. The irrigators drove around to various places to turn on the water and would use this horse in a cart. It was a small mare; I don't think it would weigh over 850 pounds; generally used her single, worked both ways, single and double. I do not know how well bred she was. It was a mare. We used to let her stand around without hitching. We used to let her stand around without tying up, the irrigators using her. I never knew of her being a vicious or unmanageable horse or anything of that kind. [95]

Cross-examination.

I don't remember ever using the horse myself. The roustabouts sometimes used to use her. I would not say exactly how many years she was used, but I have known the horse for quite awhile. My best recollection is 7-8 years. There are lots of horses on the farm, and I don't remember ever driving this one.

I have driven harvesters. In case the mules became scared I would put on the brake and use the lines to stop the team.

Q. If that is the case, what is the purpose of the other two brakes on the harvester?

A. Well, they can lock all the wheels. The bull wheel, the big wheel, is the main brake. The one up on the seat is operated by the driver; that is the long iron rod that runs back from his foot to the brake, the same as on a wagon.

(Testimony of C. K. Safford.)

Some of them I think are operated with the foot and hand both.

Q. Well, wouldn't you think it would keep a man pretty busy to handle 32 mules and operate a brake at the same time?

A. Well, I have done it myself. The sack-sewer has a brake; I don't know if I could describe it on this particular machine. The sack-sewer is in the place they call the doghouse, and there is a brake there and there is a brake on the other side for the separator-tender to attend to, and if the horses start with the machine, they can throw all these brakes on.

The COURT.—Are all these brakes on the bull wheel, or different wheels?

A. No, they are all on the one wheel. [96]

The COURT.—Go ahead, Mr. Treadwell.

The JUROR.—I do not understand yet whether this witness and the other witness—I don't understand what the other two brakes are for, whether merely in the nature of emergency brakes, or to stop the machine.

A. Well, a man is there by his brake, and when the team starts, he would naturally throw it on.

Q. Suppose the other brakes were not used, could he stop the machine? A. They couldn't go far.

Mr. DUNNE.—But he couldn't stop the machine with that one brake?

A. The driver?

Q. Yes, with that one brake stop the 32 mule team?

A. I don't imagine the one brake would stop them immediately. I couldn't say whether the driver was

(Testimony of C. K. Safford.)

tied in his seat or not. I have known drivers to fix themselves in. This is generally done by the driver. I don't think the harvester comes with these attachments to be tied in. The seat has a tendency to whip about as you are rocking around; it would naturally go with the machine. As it rocks over a levee it will whip around and this strap is put around them by some drivers to prevent them from being thrown out. I do not think that those straps usually come with the harvesters. I am not in charge of that division at the present time; I was not familiar with that harvester; I do not know what harvester it was. It is my experience that straps do not usually come with the harvester. I have driven harvesters myself; have driven them without the strap, but I have heard of some particular drivers strapping themselves in, but other drivers do without the strap. [97]

The main brake on these harvesters is connected with a bull wheel. That brake is operated by the sack-sewer. Billy Trainor was the sack-sewer. Not being there, I don't know whether Trainor was on the harvester or not at the time of this runaway, so that he could operate the brake. The small wheel in front of the harvester I don't think has any brake on at all. The brake at the driver's seat operates on one of the main wheels of the machine. I do not know whether that brake operates on more than one of the wheels of the machine. On an ordinarily equipped machine the driver is supposed to be on his seat all of the time, and is supposed to have his lines in his hands all the time, and the brake is right there

(Testimony of C. K. Safford.)

at his foot or hand, whichever it happens to be, so that he is always at that station. The sack-sewer is sewing sacks. He is not simply there to attend to the brake. The brake is there where in an emergency he can run to it and use it, and the foreman of the gang, like Mr. Knight, his duties are all over the crew to watch the whole thing, but in an emergency he can run to the brake. If the team starts running the whole of them make a united effort to apply the brake. If they are not badly frightened one brake might *not* stop them if they were running away; I could not say; probably they might drag the machine a little ways. It makes a big difference whether you put on the brakes promptly, before the machine gets into rapid motion, or you wait until it gets into rapid motion and then attempt to put on the brakes; but if the horses are immediately controlled by the lines and the brake, ordinarily they can be stopped, before they get into a gallop.

Beside the sack-sewer there is also a sack-tender. His duties would not always be the same as the sack-sewer in regard to the brake. [98]

[Testimony of B. M. McSwain, for Defendant.]

B. M. McSWAIN, a witness on behalf of defendant, testified as follows:

I am a painter and reside at Los Banos. I was working for Miller & Lux in 1912 as a painter. I drove a horse and travelled from place to place to do this painting on the different ranches. There were three of us. I was not there in the field on the day that Mr. Twining was there in the field the time this

(Testimony of B. M. McSwain.)

man was killed. I saw Fred Twining driving a horse that day. I know the horse he was driving. He was attached to a cart. I have known that horse about six months; had known it six months before that time. I had been driving it. That was the horse I was driving in my business as painter. I had it attached to a cart. It was high-life, and after driving it awhile—to start out with it was pretty high-life, but after you drove it, you could get out and leave it stand any place. That is about all I can say for the horse, it was high-life. You could let her stand; get right out and throw the lines down, over the back of the seat, and I don't think she would run away. She didn't while I had her, so far as I know there was nothing vicious or unmanageable about the horse. What I mean by "high-life" is whenever you slap her with the lines she was always up and coming. She could move along in good shape and would trot along good and fast, if you wanted her to; she was a light horse. I used her about 6-7 months, and drove her on different jobs; took her along county roads past automobiles. She took to automobiles all right after awhile, that is, after we were driving her awhile. We took her right up out of the field to drive her and of course to start with she shied a little bit, it didn't amount to anything.

[99]

Cross-examination.

I drove the horse just before Mr. Twining took it; that is before the accident; Mr. Twining just borrowed the horse one day from us, as we were working in the shop at the time, and that was the day

(Testimony of B. M. McSwain.)

Spina was killed; before that I had been using the horse myself.

[Testimony of Joseph Miller, for Defendant.]

JOSEPH MILLER, a witness on behalf of defendant, testified as follows:

I reside at the Henderson ranch at Los Banos, Merced County. It is one of the Miller & Lux ranches. I am foreman of the ranch and in the employ of Miller & Lux. I have worked for the company fourteen months and have been in the valley four years. I know the horse that the painter drove; and afterwards was driven by Mr. Twining. I had the horse. They told me it belonged to the ranch. I had it on the ranch and used to drive it. I got the horse after the accident, it was on the ranch when I came. I had it for six weeks at the ranch, and then they drove her up here to Fresno when it was brought here on the other trial of this action. I had had it six weeks at my ranch, and used it for driving around to my work. I drove her myself in a cart, sometimes in a buggy. She was a small horse, about 800-850 pounds. Stands wherever you wanted her to—all-round nice horse, nothing wrong with her as far as I could see, as far as my knowledge is concerned. I have been around horses all my life. She would be just the kind of horse that you would drive around on that kind of work. I missed her very much when she left. She did not show any actions of any kind toward viciousness. [100]

[Testimony of Fred Twining, for Defendant.]

FRED TWINING, a witness for defendant testified as follows:

My home is in Fresno; I am temporarily in San Francisco. I live with my father Dr. Twining. I am now working at the Exposition in connection with the San Joaquin exhibit. At the time of this accident I was 17, I believe. I was counting sacks on harvesters; had been in that employment about a month and a half. On the renters' harvesters I would count the *acks* that were in the stacks; and on the Miller & Lux harvesters I would get it from the sack-sewers. I drove from place to place in a cart with a horse, and had been doing that for some month and a half. On the day of the accident, I was driving a horse and cart for that purpose. It was a different horse from the one I had been using before. It was the painters' horse that I was using on that day; the same horse that the painters had been using before. By "the painters" I mean Mr. McSwain, I believe, I don't know them personally. Prior to that time I had known nothing about this horse at all; that was the first time I had driven it. I drove it out of the field at the Canal Farm, south of Midway Ranch. I harnessed it myself and had no trouble harnessing the horse, and then drove it down the road to Midway Camp—about four and a half miles, and I think the harvester was about a mile out. I drove it along the road to what was known as Midway Camp, a distance of about four and a half miles. I left Canal Farm about half past seven in

(Testimony of Fred Twining.)

the morning. I drove through the camp and continued down the field toward the harvester; that was the first harvester I visited. After leaving Midway Camp I went down a road past the [101] field about a mile. I travelled in the field before coming to the harvester about six hundred yards. I believe the accident occurred at half past eight; that is my best recollection. The horse is a pretty good traveller; I made the six miles in about an hour. I trotted right along from Canal Farm to Midway Farm; went through the grain field as I approached the harvester. The stubble was all cut. It was checked. I had to drive and did drive right over the checks clear across the field. During the six hundred yards after I got into the field, heading down toward the header, I was going over checked land all the way. I made direct for the harvester; that was my objective point. Driving across the grain field it is usually plowed up, and the cart would bounce to one side and the other, and it would be uncomfortable to trot across, and I usually walked my horse. Going across the field I walked my horse that morning. From the time I left Los Banos until the time I arrived at the harvester there was no time during that period that this horse was out of my control in any way. During all that time I did not have any trouble with it in any shape or manner. I drew up to the sack-sewer's side of the harvester—left side. The sickle is on the right-hand side. I was about 3 or 4 yards away from the machine on its left-hand side. I could not say how straight I

(Testimony of Fred Twining.)

came going across the field. I don't remember if there were any irrigation ditches or not; if there were I went around them; my aim was to go practically straight. I had my horse under control at all times crossing the field. When I came up to the harvester on the left-hand side; the harvester goes along very slowly and my horse was walking. My horse was going just about the same as the harvester. When I came up to the machine I was driving the horse. I had the lines in my hand when I came up there. I drove up to the side of the harvester, and I had the lines in my hand, [102] and I believe that I changed them to my left hand and held them with my one hand, and turned in my seat towards the harvester. The sack-sewer got out and started to give me the count, and just at that moment, I believe, the harvester went over a check sideways, and the wheel on the right side of the harvester was up on top of a check, while the wheel on my side was down over the check, making the harvester look as though it was going to tip over, and that is what scared my horse, and he started out from the harvester, and that is all I saw of the accident until I turned around and saw the men with the harvester in a kind of a little bunch, and I trotted back towards them and asked them what was the matter, and they said that the driver had been badly hurt or was killed, they didn't know, and so I turned my horse right way and in a hurry I went after the foreman of the ranch. I met him down the road. He was riding a white horse, and I told

(Testimony of Fred Twining.)

him of the accident, and then I went straight on into the Canal Farm.

When my horse started to run I had my lines in my left hand and was looking back towards the machine.

I knew Mr. Trainor. One of them got off the machine—I don't remember who it was; that is between the machine and myself. The machine was running. It makes quite a bit of noise. I did not have any talk with the man on the machine that got off the machine. I had not been able to talk to him at all, it happened so quickly. He had not got up to my cart yet.

Q. Now, when your horse started to run and you had your lines held in your left hand, do you remember how tight or taut you had the lines at the time you were driving along, whether they were loose or taut, or what?

A. I held them so that I had perfect control of the horse, at any moment. [103]

Mr. DUNNE.—I move to strike that out as not responsive to the question.

The COURT.—That will be stricken out, and I wish you would talk a little louder.

Mr. TREADWELL.—Just tell the Court about how you were holding them when the horse was walking alongside the harvester and you had them in one hand, that is, if you remember how you held them? A. I don't remember.

Q. You don't remember how taut you were holding them?

(Testimony of Fred Twining.)

A. I know that I had them tight enough to keep the horse under control.

The lines were regular buggy lines. I know that I had them under me, and they hung down the back about two feet. This is the same harness I used before, although the horse was different; ordinarily when I used the lines the lines were under me on the seat and hung down a couple of feet behind. When I was holding them in my hands I was sitting on the lines. When the horse started to run I grabbed the lines with both hands and tried to hold them, but on account of the checks I would bounce out of my seat and I would loosen them again, and he would get another start. I would bounce up from the seat. During all that time I had the lines in both hands. I never at any time lost control of the lines from the time the horse started to run and I took the lines from one hand to two. I kept them in two hands all the time that it was being bounced up over these checks.

The horse ran until I got him entirely under control, I should say a block, about 300 yards. [104]

Here the Court with the usual admonition to the jury, takes a recess of ten minutes.

AFTER-RECESS SESSION.

The COURT.—Gentlemen, as to the evidence of this widow that was given before, I read it over again, and it seems to me ambiguous as to whether or not this child is the child of the deceased, and I notice in your instruction, Mr. Dunne, instruction in regard to damage, you don't take into considera-

(Testimony of Fred Twining.)

tion the child at all. Am I to understand that this child is not his child.

Mr. DUNNE.—No, your Honor. The child is his child.

The COURT.—The jury could infer from the evidence it is his child.

Mr. DUNNE.—Yes, that is the fact and truth, as I understand it.

The WITNESS.—(Continuing.) When I got the horse under control I looked back; the mule team was still running. I saw it when it stopped. Some man ran alongside the mules and got hold of the leaders. I turned the cart around. I saw these men back where the harvester started. I drove back. I did not drive all the way back; I drove back within talking distance. I just saw these men, I could not see the driver. They told me the man was either killed or unconscious. I have no recollection as to what particular man I talked to at that time. I did not know any of the men personally I know Mr. Kinght by sight; I have seen him since; I knew him at that time; I do not remember whether I talked to him or to someone else, but I did find out what the condition was. I then drove to the foreman of Midway Camp, Mr. Allen, and met him on a white horse riding horseback. I told him of the accident. I believe he went out to the harvester and then came back. I went into town. From [105] the time the horse started to run until I finally got it under control, I did everything in my power to control the horse. I am left-handed.

(Testimony of Fred Twining.)

Cross-examination.

On July 1st, 1912, I was 16 years 6 months and 18 days old. At that time I was going to school and continued to go to school until the 26th of January, 1915. I graduated last June and then took up the Junior College course. During those times I was living at home with my parents. I did not see Spina leave his seat on that occasion. I did not see Mr. Spina, the driver of the team leave his seat on that occasion; I do not know under what circumstances, if any, Spina actually left that place, and I could not say whether it was the sudden turn to the right, or the structure of the seat, or the high ladder, or what it was, that made Mr. Spina leave that seat. I do not know under what circumstances he actually left that place. The men told me he was unconscious. I did not see him. My horse was alongside the harvester. My horse ran and the mule team ran and later on when I returned to talking distance I was advised that Mr. Spina was unconscious. When I was alongside the harvester my horse was walking and the mule team was walking, too. The reins were in my left hand. I changed them to my left hand. At that time I was looking toward the machine and the sack-sewer was getting out of the harvester on the side I was on. He started to go toward me. I was looking toward the harvester. It was then that the horse ran. The field through which I came was plowed and for that reason I walked my horse. I was not a witness before the coroner's inquest. I was not out counting grain sacks. I don't remem-

(Testimony of Fred Twining.)

ber whether I was out counting grain sacks at that time at Sentinel farm; I don't recollect going to Sentinel farm the day of this accident; Sentinel farm is one of the farms of Miller & Lux; I have been there; I do not remember [106] whether on the day of the coroner's inquest was held on the body of Peter Spina I was at Sentinel farm, a Miller & Lux farm some 12 miles off. I was in the office of Miller & Lux with Mr. Wallis and Mr. Knight after the accident. I don't recollect Mr. Wallis asking Mr. Knight how this man was killed, nor do I recollect the reply that Mr. Knight made; I do not remember whether I said anything else on that occasion—it is too long ago.

Q. I will ask you if it is not a fact that on that occasion Mr. Wallis wanted to know how it was that this man was killed, and Mr. Knight then and there charged you with being responsible for the accident, and you said nothing and remained silent.

A. Yes, sir. That occurred.

On the first trial of this case I was present here in Fresno County. I was not a witness on the last trial of this case. I have had conversations with the attorneys for Miller & Lux about this case. I told them all I knew about the case. I think what frightened my horse was the fact that the harvester was going over the ditch and it was tipped at an angle, and that was what frightened my horse, I said that that was what frightened him. I don't know anything different; I have never given a different explanation.

(Testimony of Fred Twining.)

Q. Now, I want to call your attention to the picture of the harvester here, and I call your attention to the ladder leading up to the seat where the driver is, and ask you if you didn't make the statement that it was this ladder which frightened your horse and not the tipping of the whole vehicle back here at an angle. A. Never. [107]

Q. Never. In San Francisco, on May 12, 1915, in the California Building at the Exposition, in the presence of J. F. O'Malley, were you asked to give the details of how this accident happened?

A. Yes, sir.

Q. On that occasion and to that gentleman, did you state that your horse was frightened, the reason your horse was frightened was because of this projecting ladder, which stuck out in front of the harvester proper?

A. Never.

Q. Never. Now did you have a conversation at that time with Mr. O'Malley?

A. Yes, sir.

Q. Will you relate that conversation.

A. He asked me—

Q. Asked you for the details?

A. For the details, yes, sir, and I told him the only way I knew, as I have stated here before.

Q. Just as you stated it here to-day?

A. Yes, sir.

Q. Now, at that time did you tell Mr. O'Malley that you were sitting in your cart?

A. No, sir.

(Testimony of Fred Twining.)

Q. Didn't Mr. O'Malley press you as to what the real cause of the accident was?

A. I don't remember.

Q. You don't remember. and in response to that didn't you tell him that you did not know because you were not looking at the mules at the time of the accident and that your back was to the harvester? Did you tell him that?

A. No, sir, I didn't. Well, when my horse was running, my back was to the harvester. [108]

Q. No, no. but didn't he say to you: "Please tell me what was the real cause of that accident," and didn't you then say to him "Well, I don't know, because I was not looking at the mules at the time?"

A. No, sir.

Q. "My back was to the harvester?" A. No, sir.

Q. Did you tell him at that time that your horse was facing the same way as the mules, going the same way, facing the same way?

A. Yes, sir.

Q. Did you tell him that you were not looking at the mules? A. No.

Q. Did you tell him that you were not looking at the mules, and the next thing you knew the mules were going like hell? Did you tell him that?

A. I don't remember.

Q. You don't remember. Did you also tell him on that occasion that you were sitting in your cart watching the men at work on the harvester when the accident happened?

A. I don't remember.

(Testimony of Fred Twining.)

Q. You don't remember. Did you also tell him that at that time you were waiting to get the count of the sacks? A. Yes, sir.

Q. And didn't O'Malley then ask you how it was that you should turn your back to the harvester, and did you not tell him then that you would not give him any more information? Did that occur?

A. I don't remember.

Q. You don't remember. It was in the afternoon, wasn't it, when Mr. O'Malley called on you at the Exposition? A. Yes, sir [109]

Q. And it was on the afternoon of the 12th of May?

A. I don't know what the date was.

Q. Oh, there is one thing I would like to ask you, Mr. Twining. You told us here in your direct examination that there was no talk between you and the man who stepped out of the harvester to come towards the cart, and the reason you gave for that was he had not got to the cart yet? A. Yes, sir.

Q. Now that man was Trainor, wasn't it?

A. Yes, sir.

Q. Wasn't it the sack-sewer?

A. I don't remember.

Q. Now, isn't it a fact, Mr. Twining, refreshing your memory a bit, that there was a conversation at that time, was some little talk at that time between you and that man? A. I don't remember.

Q. And didn't you in point of fact, at that time, say to that man that this horse that you were driving ran away with you twice this morning?

Mr. TREADWELL.—You mean when he was

(Testimony of Fred Twining.)

standing there at the harvester.

Mr. DUNNE.—I mean just what I am saying. I will fix the time specifically. At the time you were in your cart alongside the harvester, the mules walking, and your horse walking, and this man, this sack-sewer steps out of the harvester and starts to come *towards, right* at that time, and just before your horse ran, at the time when you say there was no conversation between you and that man because he had not yet got to the cart, I ask you if at that point of time there was not a conversation between you and that man in which you said to him that the horse ran away with you twice this morning.

A. I do not remember.

Q. You do not remember? That is all, Mr. Twining. [110]

Redirect Examination.

I was taking the count of ten harvesters at the time of the accident. I was not going to school; that was my vacation. Before that I went to the Fresno High School. I was in the sophomore year at that time. The field was plowed, I mean before it was planted. It was not a freshly plowed field. Prior to the first trial of this case on May 7, 1914, I attended a May Day Festival at Los Banos, the first of May. Mr. Treadwell, the defendant's attorney, was present there at that time. I remember meeting him and remember going over with him my version of the accident. I did so at that time. So far as I remember that was the first time that I had ever talked to him about the case. He had communicated with me in some way

(Testimony of Fred Twining.)

before that. But I do not remember whether I was to be present at the trial or not. At the time I told him my version of the accident, I told it exactly as I have told it on the stand now. I don't remember whether I was told that I would be wanted on the trial. I came back to Fresno the next day. I was at school at the time of the trial and he called me at the school. He got the number of the school where I would be so that he could call me at the school and let me know. I did not want to lose any time from my school; I wanted to go to school and stay there until I was wanted here by Mr. Treadwell. He had my father's number and my number at school. I was ready to come to testify at any time, and expected to be called as a witness.

Mr. TREADWELL.—I think it is only right it should be stated to the jury that the record shows that when the plaintiff got through with its case last time, the defendant refused to put in any evidence and didn't put in any evidence or call any witnesses. That is correct, Mr. Dunne?

Mr. DUNNE.—That is the fact. [111]

I was subsequently told that I would not be needed. The first time that I ever talked to the attorneys of this company at all was just before the trial of the case, shortly after the May Day Festival. When the case was called at this time I was again notified that I would be wanted. Was notified by telephone at the Exposition. I was told to come down here and testify if necessary. I have been in attendance here all the time; I was not asked to testify at the coroner's inquest.

(Testimony of Fred Twining.)

Q. Counsel asked you if, when you were driving alongside of the harvester on that morning, and Mr. Trainor or whoever it was was getting off the harvester to come towards you, if you didn't say to him that your horse had run away twice that morning, and, as I understood you you stated that you didn't remember stating that. A. Yes, sir.

Q. Well, did you state it?

Mr. DUNNE.—He says he does not remember.

The WITNESS.—I don't remember. The only thing that I remember is that he got off and at that moment my horse started.

Mr. TREADWELL.—Well, if your horse had run away twice that morning, you would know of it now? A. Yes, sir.

Q. And you were not simply telling him something that was not true that morning, were you?

A. No, sir.

Q. Counsel has stated something about some man named O'Malley. Where did you first meet Mr. O'Malley?

A. Mr. O'Malley introduced himself. [112]

Q. He was a stranger to you, then?

A. He said he was a newspaper man.

Q. He said he was a newspaper man. You don't know whether he was a newspaper man or a "gumshoe" man or what? That is correct?

A. Yes, sir.

Q. But he said he was a newspaper man and then started to ask you questions about this matter?

A. Yes, sir; he said that some man in the "Repub-

(Testimony of Fred Twining.)

lican," down here, had called him up to get the details on the case so that they could write it up in the "Republican."

(Defendant rests.) [113]

[**Testimony of J. F. O'Malley, for Plaintiff, in Rebuttal.**]

J. F. O'MALLEY, a witness on behalf of plaintiff in rebuttal, testified as follows:

I am a law student. I have my office with Daniel H. Knox, 1207 Claus Spreckels Building, San Francisco. I am acquainted with Merced H. Farrar, counsel for plaintiff, and Mr. Carter Farrar, his brother.

I recollect receiving a telephone on the 12th of May from Mr. Carter Farrar at San Francisco and called on him and had a conversation with him, and in consequence of that conversation went out to the Exposition at San Francisco; called at the California Building and inquired for Mr. Twining. I saw him and had a conversation with him. I called on Mr. Twining and asked if he was familiar with the case which was pending in Fresno County in which Miller & Lux was one of the parties. He said he was. I asked him was he familiar with the facts? He said he was. I asked him would he have any objection to giving the facts to me. He said no. He just asked me who I was. I told him I was from the "Examiner," and he proceeded then to tell me that he was driving a horse and cart for Miller & Lux, who had several harvesters working in the field, and he was to take the count of the sacks, and he said he was at the last

(Testimony of J. F. O'Malley.)

harvester, and on that harvester there was something like a ladder which came out over the mules. He said this ladder scared these mules and threw the man off the harvester and killed him. He said his horse did not get scared, just the mules got scared. I asked him if he knew the true cause of the accident. He said that he was standing watching the men working on this harvester. I don't know whether he said "man" or "men," I don't know which; that this ladder had scared [114] them and that this was the cause of the accident. He said the horse was facing the same way that the mules were, on the harvester, and that his back was to the harvester. The next thing he saw the mules—to use his own slang—"running like hell," and I then says to him, "Well, how is it that you had your back to the harvester." It was at this point that he told be that he should not give me any more information, but if I desired any to call on attorney Treadwell. If I am not mistaken, he mentioned the Merchants Exchange Building, which was his office, and thereupon the conversation between us ceased. He did not say a word about his own horse running, in the course of the conversation,

Defendant thereupon moved that the Court instruct the jury to render a verdict in favor of defendant and against plaintiff. The Court denied said motion, to which ruling defendant excepted. [115]

The foregoing constitute all of the evidence and proceedings on the trial of the above-entitled cause.

Thereupon the Court gave the following instructions to the jury:

[Instructions of the Court to Jury.]

1. In this case, the words "master and servant," as used in the pleadings and evidence, mean the same as principal and agent, or employer and employee.

2. I charge you that the rules of law relative to the liability of a master for the negligent acts of a servant committed in the prosecution of the master's business, apply to corporations as well as to individuals. A corporation, from its very nature, can act only through its agents, who are in law deemed its servants; and I charge you that in respect of liability for the acts of their servants, private corporations stand upon the same footing as individuals.

3. You are instructed that in certain States, including this State, laws have been enacted known as Workingmen's Compensation Laws under which the employee is entitled to compensation for injuries and his heirs for death irrespective of the negligence of the employer, but the plaintiff does not rely upon such laws and cannot recover upon them. If he had any redress under such laws it must be sought by proceedings other than this proceeding.

4. I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious, knows its vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition [116] or propensities, is the knowledge of the master sufficient in law to render the latter

liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability.

5. You are instructed that defendant was only required to use ordinary care in the selection of horses and other appliances. If the horse in question was such a horse as a reasonable prudent man would ordinarily use under the circumstances defendant was not guilty of negligence in that regard. The mere fact that the horse had characteristics not uncommon in horses of that age, and which would not be deemed by a man of ordinary prudence to make it unfit for use, would not make the use of such horse negligence.

6. If the harvester in question was constructed as harvesters are usually constructed and was such as men of ordinary prudence use in their business defendant was not guilty of negligence in employing such a machine.

7. You are instructed that where a horse runs away with the driver, there is no presumption of negligence.

8. Negligence is the doing of some act which a reasonable and prudent man would not do; or the omission to do something which a reasonable and prudent man would do, actuated by those considerations which ordinarily regulate the conduct of human affairs; it is the failure to use ordinary care

or skill by one sought to be charged with negligence in the management of his property or person. [117]

In determining the issue of negligence and of contributory negligence, the Court instructs you that the burden of proving negligence is upon the party asserting such negligence; but in determining whether or not there has been such negligence you will consider all of the evidence bearing upon that subject regardless of which party introduced the same. That is to say, if you find that the greater weight of all the evidence is in favor of the negligence of the defendant, you should accept that as a proved fact in the case; while if the evidence on that issue is in your judgment evenly balanced, or preponderates against such negligence it is not proved, and you should find that the defendant was not negligent. If you find that the greater weight of all the evidence is in favor of the contributory negligence of the plaintiff, you should accept such contributory negligence as a proved fact; or if the evidence on that issue is, in your judgment, evenly balanced, or preponderates against such contributory negligence, it is not proved, and you should find that the plaintiff was not guilty of contributory negligence.

Negligence on the part of either the plaintiff or the defendant is of no consequence in the case unless you also find that such negligence was a proximate cause of the injury. By proximate cause is meant the efficient cause; the one that necessarily sets the other cases in operation. It is that which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which

the loss is produced, it is the cause to which such loss should be attributed.

In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence [118] was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence, however slight, contributing proximately thereto; otherwise your verdict must be for the defendant.

9. On the subject of contributory negligence, I charge you that the law makes due allowance for the mistakes or errors of judgment which are likely to happen during emergencies. I charge you that a mistake of judgment should not be confounded by you with contributory negligence; a mistake of judgment is not contributory negligence.

10. You are instructed that in order for plaintiff to recover in this case he must show that defendant was guilty of negligence and that such negligence was the cause of the death of the decedent. In this connection you are instructed that an employer is not responsible for the death of the employee unless the employer was guilty of negligence. If therefore you find that the death was accidental, and not caused by any negligent act of defendant, the plaintiff cannot recover. The employer is not an insurer nor is it to be held liable for injuries merely of an accidental character, and not caused by its negligence.

11. If you find from the evidence in this case that

on July 1st, 1912, the deceased was a married man, and left him surviving a widow and child, and that on said date he came to his death by the negligence of the defendant here, you will, as I have already instructed you, find a verdict in favor of the plaintiff; and you will then proceed to consider the question as to the amount of damages to be awarded because of said death; [119] and I instruct you that such damages may be given by you as under all the circumstances of the case may be just; and in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the widow of the deceased, by reason of the death of the deceased. Upon this question of damages, you should estimate and determine the amount that the deceased, in all reasonable probability, would have earned in the years yet remaining to him; and deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate the widow and child, and in estimating the pecuniary loss, if any, to the widow and child, you have a right to take into consideration the loss of the society, comfort and care suffered by her and said child by reason of the death of the husband and father. You must not take into consideration the sorrow that the widow and child suffered by reason of the death of the deceased.

12. It is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case in order that you may render a gen-

eral verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given to you by the Court, a wrong for which the parties would have no remedy, because it is conclusively presumed by the Court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do. If the Judge should be in error in his instructions to you as to the law, the parties [120] have a plain remedy to correct such error by appeal or new trial.

On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose. The Court cannot determine the facts, nor aid you in arriving at them except by giving you the rules of law to be used by you in arriving at the truth. You are the sole judges of the effect and value of the evidence. Your power, however, of judging of the effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfied your minds; in other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

In weighing the evidence you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses; their character, as shown by the evidence; their manner on the stand; their relation to the parties, if any; their interest in the case; their bias and prejudice, if any; their degree of intelligence; the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth, this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the [121] witness for the truth, honesty, or integrity, or his motives, or by contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is sworn to correspond with the rep-

resentation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts. You are not to consider as evidence or law any argument, comment or suggestion made by counsel during the trial of this action.

Such statements, arguments, comments, or suggestions are not evidence and must not be considered by you as such. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court; such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom and such presumptions as the law may deduce therefrom, as [122] stated in these instructions, and upon the law as given you in these instructions.

You must *weight* and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow-jurors, and he should not hesitate to change his views or opinions on the case when convinced that

they are erroneous.

The defendant then and there excepted to the following portions of said charge to the jury, to wit:

**[Instructions to Which Exception was Taken
by Defendant.]**

1. Plaintiff's instruction No. 4, which reads as follows:

“I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious, knows *it* vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition or propensities, is the knowledge of the master sufficient in law to render the latter liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability.” [123]

on the ground that there being no evidence that the horse in question was vicious it was improper to submit that issue to the jury.

2. That part of instruction of No. 8 which reads as follows:

“In order, therefore, to find a verdict for the

plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence, however slight, contributing proximately thereto; otherwise your verdict must be for the defendant.”

on the ground and for the reason that the same does not correctly state the law applicable to said case, in this: that it instructed the jury that if it found the plaintiff guilty of any contributory negligence, however slight, it must find a verdict for the defendant.

Prior to the argument of the said cause to the jury, the defendant reasonably requested the Court to give the following instructions to the jury, but the Court refused to give the said instructions, or any thereof, and to such refusal the defendant then and there duly excepted, on the grounds hereinafter set forth, as follows, to wit:

[Instructions Offered by Defendant and Refused.]

1. Instruction No. 1 so requested by defendant and reading as follows:

“You are instructed that plaintiff having failed to prove whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law of this State, or whether or not the employer and employee in this case had elected to come [124] under the provi-

sions of that law, he has failed to establish a fact necessarily affecting his right to recover and he therefore cannot recover in this action.” on the ground that the said instruction correctly states the law applicable to the case, and that said instruction was not in any form given by the Court to the jury.

2. Instruction No. 2, which reads as follows:

“If the horse and cart was equipped in the usual manner that such horses and carts are equipped and with such means of control as are usual and as reasonably prudent men use, defendant was not guilty of negligence in furnishing it to its employee.”

on the ground that the said instruction correctly states the law applicable to the issues of said case, and was not in any form given by the Court to the jury.

3. Instruction No. 3, which reads as follows:

“Defendant is not required to use any extraordinary or unusual means of carrying on its operations. It may use such means and instrumentalities as are usual in that line of business, and such as man of reasonable prudence ordinarily use in such business.”

on the ground that the said instruction correctly states the law applicable to the case, and that said instruction was not in any form given by the Court to the jury.

4. Instruction No. 4, which reads as follows:

“Horses broken and trained to the extent that horses are usually broken and trained by men of

ordinary prudence may be used although they may be high-strung and require control. The mere fact that they will not stand alone without hitching or that they will run if frightened, or that they are restive and fret when made to stand, or otherwise balky or fractious, [125] does not make it negligence to use them if a reasonably prudent man would ordinarily use them under the circumstances.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

5. Instruction No. 5, which reads as follows:

“If you find that the negligence of the decedent was of the same character or degree as the negligence of defendant, plaintiff cannot recover.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

6. Instruction No. 6, which reads as follows:

“If you find that the negligence of the decedent was equal to that of the defendant, plaintiff cannot recover.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

7. Instruction No. 7, which reads as follows

“In this connection you are instructed that

gross negligence is that lack of care which even a person of careless habits would observe in avoiding injury to his own person or a life under circumstances of equal or similar danger.

It consists of a reckless disregard of danger.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

8. Instruction No. 8, which reads as follows:

“In order to constitute gross negligence some degree of wilfulness is necessary. It involves recklessness, and an intent, [126] actual or constructive, to act irrespective of the rights of others must be shown.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

9. Instruction No. 9, which reads as follows:

“You are instructed that plaintiff has not charged defendant with gross negligence, so that defendant cannot be held responsible if decedent was guilty of contributory negligence.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

10. Instruction No. 10, which reads as follows

“Unless decedent used ordinary care and diligence it cannot be said that his negligence was slight.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

11. Instruction No. 11, which reads as follows:

“The fact that defendant has pleaded that the negligence of decedent contributed to his death cannot be taken by you as an admission by defendant that it was in any way guilty of negligence nor can it be taken as any evidence of negligence by defendant.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

12. Instruction No. 12, which reads as follows:
[127]

“Damages in a case of *his* kind cannot be made vindictive to punish the defendant, nor can they be based on the sorrow, grief, or suffering which the death may cause the family of the decedent. Damages must be limited to the pecuniary loss, if any, to the heirs by the death. You are not permitted to measure the loss except so far as it was a pecuniary loss.”

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

**[Proceedings had Relative to Allowance of
Exceptions to Instructions, etc.]**

All the foregoing exceptions as to instructions

given, asked and refused, are allowed under the following circumstances, to wit: Rule 22 of the United States District Court for the Southern District of California, was not followed as it is written. No exceptions were noted before the jury left the box to consider of their verdict, but the following did occur at the trial: The following stipulation was entered into in open court at the suggestion of the Judge with regard to the taking of exceptions:

The COURT.—Better have a stipulation here that the rule obtaining in the State Court shall apply here, in regard to exceptions.

Mr. TREADWELL.—I think so.

Mr. DUNNE.—Then it may be stipulated that it is not necessary for either side to take any exceptions in the course of this trial to any ruling which may be made by his Honor.” (Rep. Trans., p. 22.)

After the Court charged the jury, and while the jury was still in the box, the following stipulation was entered into in [128] open court at the suggestion of the Court with regard to the taking of exceptions to the giving of its instructions and refusal of instructions requested:

The COURT.—The rule of court requiring exceptions to be noted at the time—it is generally the practice to waive that and allow the exceptions to be taken at a subsequent time. Will you stipulate that may be done?

Mr. DUNNE.—Yes, your Honor, if it is agreeable to counsel on the other side.

Mr. SHORT.—Yes.” (Rep. Trans., p. 134.)

After the testimony was closed and the opening

argument made to the jury by counsel for plaintiff, and before the argument by counsel for defendant, the following occurred at the trial:

Mr. TREADWELL.—If your Honor please, under the peculiar practice of this Court, in addition to the motion for a nonsuit, it is necessary to make a motion, on the same grounds, to direct the verdict. I want the record to show that we made that motion.

The COURT.—All right. (Rep. Trans., p. 125.)

The Court is of the opinion that the plaintiff stipulated as shown by the foregoing, that the exceptions could be noted as taken and shown in the bill of exceptions; that this stipulation was not only between the parties, but that the Court was a party to it; that said stipulations were made in the presence of the jury and before the jury retired from the box to consider of their verdict; that said stipulations had the force and effect of exceptions noted, as required by Rule 22, in the presence of the jury; that the requirement of Rule 22, or the Statute of [129] Westminster II, not being a constitutional requirement, could be waived by stipulation and estoppel. The defendant objects to the insertion in the bill of exceptions of this statement containing said stipulations, and insists that the bill of exceptions should be settled and the exceptions shown without this statement. The plaintiff desires to withdraw from said stipulations, and to have said exceptions stricken out of the bill of exceptions, and the bill to state exactly what was done. The Court is of the opinion that it is in duty bound to allow

said exceptions as aforesaid, and as noted in the bill, but to state the exact facts in the bill of exceptions, as to what occurred. The Court is of the opinion that all the elements of an equitable estoppel are present here, even if the plaintiff is not bound by said stipulations. So far as the trial court is concerned, the plaintiff is not permitted to withdraw from said stipulations. The objection of the defendant to the insertion of this statement in the bill of exceptions is overruled, and an exception is allowed the defendant to this ruling of the Court.

Thereupon the said cause was submitted to the jury and the jury retired to consider their verdict, and thereafter returned a verdict, which will be found in the judgment-roll herein, and to which verdict the defendant now duly excepts.

Thereafter, by stipulation of the parties, and order of court, the time within which the said defendant might prepare and present a bill of exceptions in said cause was duly extended to and including the 6th day of August, 1915. [130]

[Defendant's Specification as to Insufficiency of Evidence.]

The defendant now specifies the following particulars in which the evidence is insufficient to justify the verdict:

1. The evidence is insufficient to justify the finding that this action was brought upon behalf of the estate or the heirs of Pietro Spina.

2. The evidence is insufficient to show that the person alleged to have been killed on the first day of July, 1912, left any heirs, or that he left the wife

and child referred to in the amended complaint herein.

3. The evidence is insufficient to justify the finding that the defendant came to his death by reason of any carelessness or negligence of the defendant, its agents, employees or servants.

4. The evidence is insufficient to justify the finding that the horse furnished by defendant to Twining was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach the harvester team mentioned in said complaint.

5. The evidence is insufficient to justify the finding that the defendant knew that said horse was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach said harvester team.

6. The evidence is insufficient to justify the finding that the defendant carelessly or negligently caused or permitted said Twining to approach said harvester.

7. The evidence is insufficient to justify the finding that the said Twining did negligently or carelessly approach the said harvester.

8. The evidence is insufficient to justify the finding that the said Twining approached the said harvester or that [131] defendant permitted him to approach said harvester without any effort to manage, restrain, control or quiet said horse.

9. The evidence is insufficient to justify the finding that the said Twining failed and neglected to take proper precautions in the care or driving of said

horse to avoid the frightening of said harvester team.

10. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence to defendant said horse frightened said harvester team, or caused the same to run away or to injure or kill the said Spina.

11. The evidence is insufficient to justify the finding that the defendant failed or neglected to take reasonable or proper precautions to protect decedent.

12. The evidence is insufficient to justify the finding that the defendant failed or neglected or carelessly or negligently or otherwise failed or neglected to provide proper, adequate or safe appliances or instrumentalities for the conduct of its operations.

13. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise failed or neglected to supply decedent with a safe place to work.

14. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise caused or permitted the said Twining to use a dangerous or frightening horse.

15. The evidence is insufficient to justify the finding that the defendant carelessly or negligently failed or neglected to provide Twining with a safe and gentle horse as would enable him to approach said harvester team without frightening it. [132]

16. The evidence is insufficient to justify the finding that any negligence or carelessness of defendant caused the injury set forth in the complaint, or that the cause of action therein alleged is based thereon.

17. The evidence is insufficient to justify the find-

ing that by reason of any carelessness or negligence of defendant plaintiff has been damaged in the sum of five thousand (5,000) dollars, or any sum.

18. The evidence is insufficient to justify the finding that plaintiff prosecutes the action for or on behalf of the wife or minor daughter of said decedent.

[Defendant's Specification of Errors at Law.]

And defendant now specifies the following errors at law, occurring at the trial and excepted to by defendant:

1. The Court erred in denying the motion for nonsuit.

2. The Court erred in denying the motion of defendant to instruct the jury to render a verdict in favor of defendant and against plaintiff.

3. The Court erred in admitting in evidence the transaction that took place near said harvester on the 27th day of June, 1912, and in overruling the defendant's objections thereto, and in denying the motion to strike the same out.

4. The Court erred in admitting in evidence the probate record in the matter of the estate of Peter Spino.

5. The Court erred in overruling the objection of defendant to the following question propounded to the witness Knight:

“Now, you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion; state your opinion as to the character of that horse.”

[133]

6. The Court erred in overruling the objection of

defendant to the following question propounded to the witness Knight:

“Q. *Would* you say that a horse of that kind— could you describe a horse of that kind as a spirited animal?

7. The Court erred in overruling defendant’s objection to the following question propounded to the witness Salapi:

“Q. I wish you would describe what kind of an animal in your opinion this horse was.”

8. The Court erred in giving instruction No. 4, and excepted to by defendant.

9. The Court erred in giving that part of instruction No. 8 excepted to by defendant.

10. The Court erred in refusing instruction No. 1 requested by defendant.

11. The Court erred in refusing instruction No. 2 requested by defendant.

12. The Court erred in refusing instruction No. 3 requested by defendant.

13. The Court erred in refusing instruction No. 4 requested by defendant.

14. The Court erred in refusing instruction No. 5 requested by defendant.

15. The Court erred in refusing instruction No. 6 requested by defendant.

16. The Court erred in refusing instruction No. 7 requested by defendant.

17. The Court erred in refusing instruction No. 8 requested by defendant.

18. The Court erred in refusing instruction No. 9 requested by defendant. [134]

19. The Court erred in refusing instruction No. 10 requested by defendant.

20. The Court erred in refusing instruction No. 11 requested by defendant.

21. The Court erred in refusing instruction No. 12 requested by defendant.

NOW, THEREFORE, to the end that the said proceedings may be and remain of record, said defendant presents this, its bill of exceptions, and asks that the same may be settled, approved and allowed.

EDWARD F. TREADWELL,
Attorney for Defendant Miller & Lux, Incorporated.

**[Order Settling, Allowing and Approving Bill of
Exceptions.]**

The foregoing bill of exceptions having been duly *present* within the time allowed by law, it is hereby settled, allowed and approved.

Dated: Oct. 13th, 1915.

OSCAR A. TRIPPET,
District Judge. [135]

[Endorsed]: No. 42 (Civil). N. D. In the United States District Court for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Plaintiff, vs. Miller & Lux, Incorporated (a Corporation), Defendant. Bill of Exceptions. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Edward F. Treadwell, Attorney at Law, 1323 Merchants Exchange Building, San Francisco, California. [136]

*In the United States District Court, in and for
the Southern District of California, Northern
Division.*

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corpora-
tion),

Defendant.

Petition for Writ of Error.

Now comes Miller & Lux Incorporated (a corpo-
ration), defendants herein, and says that on or about
the 18th day of May, 1915, this Court entered judg-
ment in favor of the plaintiff and against this defend-
ant, whereby it was adjudged that plaintiff have and
recover from defendant the sum of five thousand
(5,000) dollars, and in which judgment and proceed-
ings had prior thereunto in this case, certain errors
were committed to the prejudice of this defendant; all
of which will appear more in detail from the assign-
ment of errors, which is filed with this petition.

WHEREFORE this defendant prays that a writ
of error may issue in its behalf out of the United
States Circuit Court of Appeals, in and for the Ninth
Circuit, and that said defendant be permitted to
prosecute the same to said last-mentioned court for

the correction of errors so complained of, and that a transcript [137] of the record, proceedings and papers in this cause, duly authenticated, may be sent to the same Circuit Court of Appeals, and that an order be made fixing the amount of the supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of said bond, all further proceedings in this court be suspended, stayed and superseded until the determination of said Writ of Error by the United States Circuit Court of Appeals, in and for said Ninth Circuit.

Dated September 7th, 1915.

EDWARD F. TREADWELL,

Attorney for Defendant.

[Endorsed]: No. 42. (Civil.) In the United States District Court in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated, Defendant. Petition for Writ of Error. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law, 1323 Merchants Exchange Building, San Francisco, California. [138]

*In the United States District Court, in and for
the Southern District of California, Southern
Division.*

No. 42—(CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corpora-
tion),

Defendant.

Assignment of Errors.

Now comes the defendant herein, Miller & Lux, Incorporated (a corporation), and in connection with its petition for writ of error in the above-entitled case, makes the following assignment of errors, which it avers occurred upon trial of the cause and upon which it will urge its writ of error in the above-entitled action, to wit:

I.

That during the trial of said action, Morrison Knight was called as a witness on behalf of the plaintiff and was asked the following question:

“Mr. DUNNE.—Q. On the 27th of June, that first occasion when he came out, three days before Spina’s death, what did Twining do on that occasion? On that day what did Twining do?”

“A. He came out to the machine. He was driving a brown horse. He got out of the cart

and got in, and got in where the sack-sewer was, and I was on top of the machine, and I looked [139] up and saw his cart going around the team, and the mules started to run and I grabbed the brake and stopped them." (Rep. Trans., p. 19.)

The defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question, and in overruling the objection.

II.

The following question was then propounded to the said witness:

"Q. And when he got out of the cart on that occasion, then did he tie up his horse anywhere, or allow the horse to wander about?

"A. Let his horse go.

"Q. Let the horse go? As I understand your testimony, that horse got up near the mule team?

"A. Went up alongside the mules.

"Q. And then they started to run, when you got to the brake and stopped them?

"A. Yes, sir." (Rep. Trans., p. 19.)

The defendant objected to these questions and answers as being entirely immaterial to any issue in the case, and having no possible relation with anything that took place on the first day of July, when the injury occurred. That the Court erred in allowing said witness to answer said question and in overruling defendant's objection thereto.

III.

The witness was then asked this further question:

“Q. Now, when that transaction occurred, did you say anything to Twining? “A. I did.
[140]

“Q. You may state now what you said to Twining at that time?

“A. When I stopped the team, I got up on the machine where he could see me, and I says: You take care of that horse or stay out of the field. That is all I remember—yes, I remember something more.

“Q. Do you recollect anything else you said to him?

“A. Yes, I do; that he might cause a runaway and kill somebody, or some of the mules tear up the machine.” (Rep. Trans., pp. 19, 20.)

Defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

IV.

The following question was then put to the said witness:

“Q. Now, when you said that to Twining, did he make any reply to you?

“A. I never heard anything.

“Q. What did he do, if anything?

“A. He got in his cart and drove off.” (Rep. Trans., p. 20.)

Defendant objected to these questions and answers as being entirely immaterial to any issue in the case, which objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court.

V.

The defendant then moved to strike out all the answers in paragraphs one, two, three and four in this assignment of errors, [141] on the grounds set forth in said paragraphs one to four, inclusive, which motion was denied by the Court, and the defendant then and there excepted to said ruling, which ruling defendant now assigns as error on the part of the Court.

VI.

Plaintiff then offered in evidence the probate record in the matter of the estate of Peter Spino, deceased, in the following words:

“Mr. DUNNE.—If your Honor please, it is alleged in the complaint and denied in the answer, on information and belief, or lack of information and belief, that by proper proceedings had in the Superior Court of the State of California, in and for the County of Merced, the present plaintiff was duly appointed the administrator of the estate of the deceased. For the purpose of supporting that allegation in the complaint, I offer in evidence the probate record in that matter, numbered 892, in the matter of the estate of Peter Spino, deceased, filed July 16, 1912; and I understand from my friends on the

other side that there is no question about the authenticity of these papers.

“The COURT.—They may be considered exhibit—whatever it is.

“And may they be regarded as read?

“Mr. Treadwell.—Yes.” (Trans., p. 61.)

The defendant objected to the offering of these probate papers in evidence on the ground that the probate proceedings were in the name of the estate of Peter Spino, *decease*; whereas the name of the decedent in this case was Pietro Spina. This objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court. [142]

VII.

The following question was propounded to the witness Knight.

“Q. Now you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion. State your opinion as to the character of that horse.

“A. Well, in my opinion it was a high-life small horse. (Rep. Trans., p. 22.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in overruling the objection.

VIII.

Said witness was then asked this further question:

“Q. Would you say that a horse of that kind— could you describe a horse of that kind as a spirited animal?”

“A. My opinion, yes.” (Rep. Trans., p. 23.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in overruling the objection.

IX.

The following question was propounded to the witness Salapi:

“Q. I wish you would describe what kind of an animal in your opinion this horse was?
[143]

“A. The horse in my opinion was full of life.”
(Rep. Trans., p. 50.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in overruling the objection.

X.

The Court then instructed the jury as follows:

“I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious,

knows its vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition or propensities, is the knowledge of the master sufficient in law to render the latter liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability.”

Defendant then and there excepted to the above instruction on the ground that there being no evidence that the horse in question was vicious, it was improper to submit that issue to the jury, and the giving of this instruction the defendant now assigns as error on the part of the trial Court. [144]

XI.

The Court then charged the jury in part as follows :

“In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence however

slight contributing proximately thereto; otherwise your verdict must be for the defendant.”

(Rep. Trans., p. 129.)

The defendant then and there excepted to the above part of the Court's instruction to the jury on the ground and for the reason that the same does not correctly state the law applicable to said case, in this: that it instructed the jury that if it found the plaintiff guilty of any contributory negligence, however slight, it must find a verdict for the defendant, and the defendant now assigns the giving of the above portion of the Court's charge to the jury as error on the part of the trial Court.

XII.

The defendant prior to the argument of the case to the jury seasonably requested the Court to give the following instruction to the jury; but the Court refused to give the said instruction or any part thereof:

“You are instructed that plaintiff failed to prove whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law of this State, or whether or not the *employer* and employee in this case had elected to come under the provisions of that law, he has failed to establish a fact necessarily affecting his right to recover and he therefore cannot recover in this action.” [145]

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in

any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XIII.

The defendant prior to the argument of the case to the jury seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“If the horse and cart was equipped in the usual manner that such horses and carts are equipped and with such means of control as are usual and as reasonably prudent men use, defendant was not guilty of negligence in furnishing it to its employees.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XIV.

The defendant prior to the argument of the case to the jury seasonably requested the Court to give the following instruction:

“Defendant is not required to use any extraordinary or unusual means of carrying on its operations. It may use such means and instrumentalities as are usual in that line of business, and such as men of reasonable prudence ordinarily use in such business.” [146]

To the refusal to give the above instruction, the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XV.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“Horses broken and trained to the extent that horses are usually broken and trained by men of ordinary prudence may be used although they may be high-strung and require control. The mere fact that they will not stand alone without hitching or that they will run if frightened, or that they are restive and fret when made to stand, or otherwise balky or fractious, does not make it negligence to use them if a reasonably prudent man would ordinarily use them under the circumstances.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XVI.

The defendant prior to the argument of the case

to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof: [147]

“If you find that the negligence of the decedent was of the same character or degree as the negligence of defendant, plaintiff cannot recover.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XVII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“If you find that the negligence of the decedent was equal to that of the defendant, plaintiff cannot recover.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XVIII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“In this connection you are instructed that gross negligence is that lack of care which even a person of careless [148] habits would observe in avoiding injury to his own person or a life under circumstances of equal or similar danger. It consists of a reckness disregard of danger.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XIX.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“In order to constitute gross negligence some degree of wilfulness is necessary. It involves recklessness, and an intent, actual or constructive, to act irrespective of the rights of others must be shown.”

To the refusal to give the above instruction the

defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XX.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“You are instructed that plaintiff has not charged defendant with gross negligence, so that defendant cannot be held [149] responsible if decedent was guilty of contributory negligence.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXI.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“Unless decedent used ordinary care and diligence it cannot be said that his negligence was slight.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“The fact that defendant has pleaded that the negligence of decedent contributed to his death cannot be taken by you as an admission by defendant that it was in any way guilty of negligence nor can it be taken as any evidence of negligence by defendant.” [150]

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXIII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

“Damages in a case of this kind cannot be made vindictive to punish the defendant, nor can they be based on the sorrow, grief or suffering which the death may cause the family of the decedent. Damages must be limited to the pecuniary loss, if any, to the heirs by the death. You are not permitted to measure the loss except so far as it was a pecuniary loss.”

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXIV.

That the District Court of the United States, in and for the Southern District of California, erred in denying the motion of the defendant for nonsuit, to which ruling the defendant then and there excepted. [151]

XXV.

The said Court erred in denying the motion of defendant to instruct the jury to render a verdict in favor of defendant and against plaintiff, to which ruling the defendant then and there excepted.

XXVI.

That the evidence is insufficient to justify the verdict in said action and defendant now specifies the following particulars in which the evidence is insufficient to justify the verdict:

1. The evidence is insufficient to justify the find-

ing that this action was brought upon behalf of the estate or the heirs of Pietro Spina.

2. The evidence is insufficient to show that the person alleged to have been killed on the first day of July, 1912, left any heirs, or that he left the wife and child referred to in the amended complaint herein.

3. The evidence is insufficient to justify the finding that the defendant came to his death by reason of any carelessness or negligence of the defendant, its agents, employees or servants.

4. The evidence is insufficient to justify the finding that the horse furnished by defendant to Twining was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach the harvester team mentioned in said complaint.

5. The evidence is insufficient to justify the finding that the defendant knew that said horse was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach said harvester team.

6. The evidence is insufficient to justify the finding that the defendant carelessly or negligently caused or permitted said Twining to approach the said harvester. [152]

7. The evidence is insufficient to justify the finding that the said Twining did negligently or carelessly approach the said harvester.

8. The evidence is insufficient to justify the finding that the said Twining approached the said harvester or that defendant permitted him to approach

said harvester without any effort to manage, restrain, control or quiet said horse.

9. The evidence is insufficient to justify the finding that the said Twining failed and neglected to take proper precautions in the care or driving of said horse to avoid the frightening of said harvester team.

10. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant said horse frightened said harvester team, or caused the same to run away or to injure or kill the said Spina.

11. The evidence is insufficient to justify the finding that the defendant failed or neglected to take reasonable or proper precautions to protect decedent.

12. The evidence is insufficient to justify the finding that the defendant failed or neglected or carelessly or negligently or otherwise failed or neglected to provide proper, adequate or safe appliances or instrumentalities for the conduct of its operations.

13. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise failed or neglected to supply decedent with a safe place to work.

14. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise caused or permitted the said Twining to use a dangerous or frightening horse.

15. The evidence is insufficient to justify the finding that the defendant carelessly or negligently

failed or neglected [153] to provide Twining with a safe and gentle horse as would enable him to approach said harvester team without frightening it.

16. The evidence is insufficient to justify the finding that any negligence or carelessness of defendant caused the injury set forth in the complaint, or that the cause of action therein alleged is based thereon.

17. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant plaintiff has been damaged in the sum of five thousand (5,000) dollars, or any sum.

18. The evidence is insufficient to justify the finding that plaintiff prosecutes the action for or on behalf of the wife or minor daughter of said decedent.

XXVII.

The jury returned a verdict in favor of plaintiff and against defendant, to which verdict the defendant thereafter duly excepted, and which verdict now assigns as error as being against law, and prays that said judgment be reversed.

EDWARD F. TREADWELL,

Attorney for Defendant.

[Endorsed]: No. 42 (Civil). In the United States District Court in and for the Southern District of California Northern Division. Saverio Di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated (a Corporation) Defendant. Assignment of Errors. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law. 1323 Merchants Exchange Building, San Francisco, California. [154]

*In the United States District Court, in and for the
Southern District of California, Northern Di-
vision.*

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX INCORPORATED (a Corpora-
tion),

Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Supersedeas Bond.**

On this 7th day of September, 1915, came the de-
fendant, by its attorney, and filed herein and pre-
sented to this Court its petition praying for the
allowance of a writ of error, and an assignment of
errors intended to be urged by him, praying also that
a transcript of the record, proceedings and papers
upon which the judgment herein was rendered, duly
authenticated, may be sent to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, and
that such other and further proceedings may be had
as are proper in the premises.

IN CONSIDERATION WHEREOF IT IS
ORDERED and the Court hereby orders that a writ
of error as prayed for in said petition be allowed
and that the amount of the supersedeas bond to be

given by defendant and upon said writ of error be, and the same is hereby fixed at the sum of seven thousand five hundred (7,500) [155] dollars, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated: Sept. 7th, 1915.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator of the Estate of Pietro Spina, Sometimes Known as, etc., Plaintiff, vs. Miller & Lux Incorporated, Defendant. Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law. 1323 Merchants Exchange Building, San Francisco, California. [156].

[Bond on Writ of Error.]

KNOW ALL MEN BY THESE PRESENTS: That we, Miller & Lux Incorporated (a Corporation), defendant, as principal, and C. Z. Merritt and David Brown, as sureties, are held and firmly bound unto Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, in the full and just

sum of seven thousand five hundred dollars (\$7,500.00), to be paid to the said Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of September in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS lately at a District Court of the United States, for the Southern District of California, Northern Division, in a suit pending in said court, between Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, plaintiff, and Miller & Lux Incorporated, a corporation, defendant, a judgment was rendered against the said Miller & Lux Incorporated, and the said Miller & Lux Incorporated (a Corporation) is about to sue out a writ of error to the United States Court of Appeals, Ninth Circuit, to reverse the judgment in the aforesaid suit, and a citation directed to the said Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days after the service of said citation. [157]

Now, the condition of the above obligation is such,

that if the said Miller & Lux Incorporated (a Corporation) shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, Miller & Lux Incorporated (a corporation) has caused these presents to be executed and signed by its secretary thereunto duly authorized and the parties named herein as sureties have caused their signatures to be affixed this 4th day of Septr., 1915.

MILLER & LUX INCORPORATED.

[Seal]

By DAVID BROWN,
Secretary.

C. Z. MERRITT,
DAVID BROWN,

City and County of San Francisco,
State of California,—ss.

C. Z. Merritt and David Brown, being duly sworn, each for himself, deposes and says: that he is a citizen and resident of the State of California, and is worth the sum mentioned in the foregoing undertaking, exclusive of property exempt from execution, and over and above all debts and liabilities.

C. Z. MERRITT,
DAVID BROWN.

Approved:

OSCAR A. TRIPPET,
Judge.

Subscribed and sworn to before me this 4th day of September, 1915.

[Seal] JAMES MASON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated, Defendant. Supersedeas Bond. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law. 1323 Merchants Exchange Building, San Francisco, California. [158]

*In the United States District Court, in and for the
Southern District of California, Northern Di-
vision.*

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA (Sometimes Known as PETER
SPINO,) Deceased,

Plaintiff,

vs.

MILLER & LUX INCORPORATED, (a Corpora-
tion),

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

The defendant hereby specifies the following papers and orders which it wishes copied in the record on the writ of error in the above-entitled suit as follows, to wit:

1. Complaint.
2. Demurrer to Complaint.
3. Substitute of Party Plaintiff.
4. Stipulation Dated April 30th, 1913, and Order Upon the Same Sustaining Demurrer to Complaint.
5. Amended Complaint.
6. Answer to Amended Complaint.
7. Verdict Dated May 18, 1915. [159].
8. Judgment.
9. Bill of Exceptions.
10. Petition for Writ of Error, Dated September 7th, 1915.
11. Assignment of Errors.
12. Bond, Dated September 4th, 1915.
13. Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond, Dated September 7th, 1915.
14. Writ of Error, Dated September 7th, 1915.
15. Citation, Dated September 7th, 1915.
16. Order, Dated September 29th, 1915, Extending Time to File Record and Docket Case.

EDWARD F. TREADWELL,

Attorney for Defendant.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California. Northern Division. Saverio di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated (a Corporation), Defendant. Praecipe for Transcript of Record. Filed Nov. 24, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law, 1323 Merchants Exchange Building, San Francisco, California. Received a Copy of the Within this 23d Day of November, 1915. M. H. Farrar, J. J. Dunne, Attorneys for Plaintiff. [160].

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Southern District of California, North-
ern Division.*

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX INCORPORATED, (a Corpora-
tion),

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court
of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing one hundred and sixty (160) typewritten pages, numbered from 1 to 160 inclusive, to be a full, true and correct copy of that part of the certified transcript of record on removal to the District Court which consists of the complaint, demurrer to complaint and certificate of county clerk, also of the order of substitution, stipulation as to demurrer and order thereon, amended complaint, answer, verdict, judgment, petition for writ of error, assignment of errors, order allowing writ of error and fixing amount of supersedeas bond, bond on writ of error, and praecipe for transcript of record on writ of error, in the above and therein entitled cause, and that the same together constitute the record in said cause, as [161] specified in the said praecipe for transcript of record on writ of error filed in my office on behalf of the plaintiff in error, by its attorney of record.

I do further certify that the cost of the foregoing record is \$82.60, the amount whereof has been paid me by Miller & Lux Incorporated, a corporation, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 10th day of December, in the year of our Lord,

one thousand nine hundred and fifteen, and of our independence, the one hundred and fortieth.

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By LESLIE S. COLYER,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp, Canceled
12/10/15, L. S. C.] [162].

[Endorsed]: No. 2711. United States Circuit Court of Appeals for the Ninth Circuit. Miller & Lux, Incorporated, a Corporation, Plaintiff in Error, vs. Saverio di Giovanni Petrocelli as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Northern Division.

Filed December 20, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States District Court, in and for the
Southern District of California, Northern Di-
vision.*

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Ad-
ministrator of the Estate of PIETRO SPINA,
Sometimes Known as PETER SPINO, De-
ceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corpora-
tion),

Defendant.

**Order Extending Time [to December 1, 1915, to File
Record, etc., in U. S. Circuit Court of Appeals].**

Good cause appearing therefor it is by the Court
ORDERED that the defendant above named may
have until and including the 1st day of December,
1915, in which to file the record on appeal and docket
the case in the office of the United States Circuit
Court of Appeals for the Ninth Circuit at San Fran-
cisco, California.

Dated this 29th day of September, 1915.

OSCAR A. TRIPPET,

District Judge.

[Endorsed]: No. 42 (Civil). In the United States
District Court, in and for the Southern District of
California, Northern Division. Saverio di Giovanni
Petrocelli, as Administrator, etc., Plaintiff, vs. Mil-
ler & Lux, Incorporated (a Corporation), Defend-

ant. Order Extending Time. No. —. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 1, 1915, to File Record Thereof and to Docket Case. Filed Oct. 4, 1915. F. D. Monckton, Clerk.

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Order Extending Time [to January 15, 1916, to File Record, etc., in U. S. Circuit Court of Appeals].

Good cause appearing therefor, it is by the Court ORDERED that the defendant above-named may have until and including the 15 day of Jan., 1916, in which to file the record on appeal and docket the case in the office of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 30 day of Nov., 1915.

OSCAR A. TRIPPET,
District Judge.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Plaintiff, vs. Miller & Lux, Incorporated (a Corporation), Defendant. Order Extending Time. No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to — to File Record Thereof and to Docket Case. Filed Dec. 1, 1915. F. D. Monckton, Clerk.

No. 2711. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to Jan. 15, 1916, to File Record Thereof and to Docket Case. Refiled Dec. 20, 1915. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. 2711.

MILLER & LUX, INCORPORATED, a Corpora-
tion,

Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as
Administrator of the Estate of PIETRO
SPINA, Sometimes Known as PETER
SPINO, Deceased,

Defendant in Error.

**Stipulation [that Certified Copy of Papers on Re-
moval from Superior Court to U. S. District
Court be Made a Part of the Record, etc.].**

In the above-entitled cause, it is hereby stipulated and agreed that the annexed certified copies of the Petition, Bond, Notice and Order, upon removal from the Superior Court of the State of California, in and for the county of Merced, to the United States District Court in and for the Southern District of the State of California, be filed in the above-mentioned United States Circuit Court of Appeals for the Ninth Circuit with the clerk thereof, and become a part of the record upon the Writ of Error now pending in said Circuit Court of Appeals in the above-entitled action;

And it is hereby further stipulated that the Judges of said Circuit Court of Appeals and the parties to

the above-entitled action, may refer for all purposes to said certified copies and to each of them, as fully as if said certified copies and each of them had been incorporated and set forth at length in the transcript of record now on file in the above-entitled cause.

MILLER & LUX, INCORPORATED,
A Corporation, Plaintiff in Error.
By EDWARD A. TREADWELL,
Attorney for Said Plaintiff in Error.

Dated at San Francisco, this 29th day of January,
A. D. 1916.

SAVERIO di GIOVANNI PETRO CELLI,
As Administrator of the Estate of Pietro Spina,
Sometimes Known as Peter Spino, Deceased,
Defendant in Error.

By J. J. DUNNE,
MERCER H. FARRAR,
Attorneys for Said Defendant in Error.

*In the Superior Court of the State of California, in
and for the County of Merced.*

No. —.

G. E. NORDGREN, as Administrator of the Estate
of PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX (a Corporation),

Defendant.

Petition for Removal of Cause.

To the Honorable the Superior Court of the State of California, in and for the County of Merced:

The petition of Miller & Lux, Incorporated (a Corporation) respectfully shows:

1. That petitioner is the defendant in the above-entitled action and has been served with summons therein.

2. That the above-entitled action is a suit of a civil nature, of which the District Court of the United States has original jurisdiction, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand (3,000) dollars.

3. That the time has not elapsed within which your petitioner is required by the laws of the State of California or the rules of the above-entitled court to answer or plead to the complaint of the plaintiff on file herein, and your petitioner has not heretofore appeared in said suit.

4. That said suit is a controversy wholly between citizens of different states, to wit, between plaintiff, who is and at the time of the commencement of this suit was a citizen of the State of California, and this defendant, who is and at the time of the commencement of this action was, and ever since the year 1905, has been, a corporation organized and existing under the laws of the State of Nevada, and is a resident and citizen of said State of Nevada.

5. That Jovetta Spino and Sunda Spino, the heirs at law of Peter Spino mentioned in the complaint

herein, are and each of them is a resident and subject of the Kingdom of Italy.

WHEREFORE, your petitioner petitions this Honorable Court for the removal of said suit into the District Court of the United States for the Southern District of California (Northern Division), and hereby files with this petition proof of service of notice thereof upon said plaintiff, and also files herewith a bond with good and sufficient sureties for its entering in said District Court within thirty days from the date of filing said petition a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully or improperly removed thereto, and said petitioner prays that this Honorable Court accept said petition and bond and proceed no further in said suit, and that upon a certified copy of said record being entered as aforesaid in said District Court of the United States the cause shall then proceed in the same manner as if it had been originally commenced in said District Court.

[Seal] MILLER & LUX, INCORPORATED,
By DAVID BROWN,
Secretary.

EDWARD F. TREADWELL,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

David Brown, being first duly sworn, deposes and says: That he is the secretary of petitioner in the above-entitled matter and makes this affidavit in its

behalf; that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

DAVID BROWN.

Subscribed and sworn to before me this 16th day of August, 1912.

[Seal]

JAMES MASON,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 30, 1912. P. J. Thornton, Co. Clerk.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, are held and firmly bound unto G. E. Nordgren, as administrator of the estate of Peter Spino, deceased, in the sum of one thousand (1,000) dollars, lawful money of the United States, for the payment of which well and truly to be made, we jointly and severally bind ourselves and each of us firmly by these presents.

Signed and sealed by me this 16th day of August, A. D. 1912.

The condition of the foregoing obligation is such that

WHEREAS, Miller & Lux, Incorporated, is about to file with the Superior Court of the State of California, in and for the county of Merced, a petition for the removal of a suit pending therein brought by said G. E. Nordgren, as administrator of the estate of Peter Spino, deceased, entitled "G. E. Nordgren, as administrator of the estate of Peter

Service and receipt of a copy of the above notice is hereby admitted this 29th day of August, 1912.

HENRY BRICKLEY and
L. J. SCHINO,
J. J. GRIFFIN,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 30th, 1912. P. J. Thornton, Co. Clerk.

*In the Superior Court of the State of California, in
and for the County of Merced.*

No. —.

G. E. NORDGREN, as Administrator of the Estate
of PETER SPINO, Deceased,
Plaintiff,

vs.

MILLER & LUX (a Corporation),
Defendant.

Order of Removal.

This cause coming on for hearing upon application of the defendant, Miller & Lux, Incorporated, herein for an order transferring this cause to the United States District Court for the Southern District of California (Northern Division), and it appearing to the Court that the defendant, Miller & Lux, Incorporated (a corporation) has filed its petition for such removal in due form of law, and within the time required by law and has filed with said petition due proof of service of written notice of filing the same upon the attorneys for the plaintiff in said action prior to the filing of said petition, and that said de-

fendant has filed its bond duly conditioned, with good and sufficient sureties, as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court for the Southern District of California (Northern Division), and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith,

Done in open court this 30th day of August, 1912.

E. N. RECTOR,

Judge.

[Endorsed]: Filed Aug. 30, 1912. P. J. Thornton, Co. Clerk.

(Endorsement on Certified Transcript of Record filed in U. S. District Court, of which the preceding Petition, Bond, Notice and Order are a portion.)

No. 42—Civil. U. S. District Court, Southern District of California, Northern Division. G. E. Nordgren, as Administrator, etc, vs. Miller & Lux, a Corp. Certified Transcript of Record on Removal from Superior Court of Merced County. Filed Sep. 14, 1912. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Certain Papers on Removal of Cause from Superior Court to U. S. District Court.]

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of that portion of the certified transcript of record on removal from the Superior Court of the State of California, in and for the county of Merced, filed in my office on the 14th day of September, 1912, in the case of Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, substituted for G. E. Nordgren, as administrator of the estate of Peter Spino, deceased, Plaintiff, vs. Miller & Lux, a corporation, Defendant, No. 42 Civil, Northern Division, which consists of the Petition for Removal of Cause, Bond on Removal, Notice of Filing of Petition for Removal of Cause, and Order of Removal, as the same appear of record in said Certified Transcript of Record on Removal, on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of January, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
1/15/16. L. S. C.]

No. 42—Civil. United States District Court,
Southern District of California, Northern Division.
Saverio Di Giovanni Petrocelli, as Administrator,
etc., Plaintiff, vs. Miller & Lux, Inc., a Corporation,
Defendant. Certified Copy Portion of Certified
Transcript of Record on Removal.

[Endorsed]: No. 2711. In the United States Circuit Court of Appeals for the Ninth Circuit. Miller & Lux, Incorporated, a Corporation, Plaintiff in Error, vs. Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Defendant in Error. Stipulation. Filed Feb. 1, 1916. F. D. Monckton, Clerk.

